



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104186/2018

5

Held in Glasgow on 27, 28 and 29 November 2018

Employment Judge: Lucy Wiseman

10 **Ms Lorraine Miller**

Claimant
Represented by:
Ms K Osbourne -
Solicitor

15 **Bute House Ltd**
t/a Acorn Park Care Home

Respondents
Represented by:
Mr C Edward -
Advocate

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was unfairly dismissed.

A remedy hearing will now be arranged. The parties asked the Tribunal to determine whether any reduction should be made to the calculation of compensation. The Tribunal decided the basic award is to be reduced by 75% in terms of section 122
25 (2) Employment Rights Act and the compensatory award is to be reduced by 90% in terms of **Polkey v AE Dayton Services Ltd 1988 ICR 142**.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 20 April 2018 alleging she had been unfairly dismissed. The claimant in particular
30 alleged there had been an inadequate investigation of the allegations, a failure to follow the ACAS Code of Practice and procedural failings in the dismissal process.

E.T. Z4 (WR)

2. The respondent entered a response admitting the claimant had been dismissed for reasons of gross misconduct, but denying the dismissal had been unfair.
- 5 3. Mr Edward, for the respondent, raised a preliminary issue at the commencement of the Hearing. He noted the claimant had provided a schedule of loss indicating she had been unable to work since the dismissal and that she intended to argue responsibility for this lay with the respondent. Mr Edward considered there had been no notice of this and no medical
10 information had been produced to support the claimant's position.
4. Ms Osbourne considered notice of this issue had been given to the respondent in the schedule of loss.
- 15 5. I adjourned the hearing to allow parties an opportunity to discuss their respective positions. I stressed I wished to make progress given parties, representatives and witnesses were all present and ready to proceed.
6. Mr Edward subsequently confirmed the parties had agreed with the
20 Employment Judge's proposal to split the merits and remedies hearings. Accordingly, this hearing is to determine only the merits of the claim, and the issues of Polkey and contributory conduct.
7. I heard evidence from Ms Suman Joshi, Director; Mr Naijal Paul, Manager;
25 Ms Julie Harland, Deputy Manager; the claimant and Mr Steven Fullerton, trade union representative.
8. I was also referred to a jointly produced bundle of documents. I, on the basis of the evidence before me, made the following material findings of fact.

30 **Findings of fact**

9. Ms Suman Joshi is the Director and owner of the respondent, which (at the time of these events) operated two nursing homes for care of the elderly: Acorn Park in East Kilbride and Bute House in Cumnock.

10. The claimant commenced employment with the respondent on the 3 May 2001. The claimant was employed as a Senior Carer working permanent night shift.
- 5 11. The claimant's employment with the respondent terminated on the 3 January 2018.
12. Mr Naijal Paul was employed as the Manager of the Acorn Park Care Home. He was responsible for the day to day running of the care home and the needs
10 of the residents.
13. Mr Paul was approached by two employees from the night shift who told him they wished to report serious concerns regarding the claimant's behaviour. The employees were frightened and not willing to discuss matters with Mr
15 Paul whilst at work, and so it was agreed Mr Paul and the Deputy Manager, Ms Harland, would meet with the employees off site.
14. Mr Paul and Ms Harland met with the two employees. Ms Harland took notes at the meeting and these notes were typed up and produced as thtatements
20 at pages 33 and 34. The employees were identified only as Staff Member A and Staff Member B.
15. The members of staff told Mr Paul and Ms Harland that they (and others) were
25 frightened to come forward and make a complaint about the claimant because she had threatened them to keep quiet. The allegations made by the two members of staff included:
- the claimant being reluctant to give fluids to residents at night, and abusing staff members who try to do so;
 - 30 • the claimant being verbally abusive to staff members for commencing fluid charts;
 - the claimant's reaction to residents who got up out of bed or buzzed for help to go to the toilet was unacceptable because she would shout at residents and ignore the buzzer;

- on one occasion the claimant had been shouting so loudly a member of staff from the floor above had come to find out what was going on;
- they had witnessed the claimant shouting at a resident in an aggressive tone, saying “you’re fucking not getting past me, get back to bed, you are here because your family don’t want you ..”;
- the claimant had told a member of staff to “show the service user in to bed with his shoes on as I’m fucking sick of this, fucking get him back to bed” and
- on one occasion when a resident was tired and wanted to go to bed, the claimant had said “you are not going to bed just now because you’re shitting and pissing all night”.

16. The members of staff told Mr Paul and Ms Harland that they no longer wanted to work with the claimant. They were very worried when the claimant was on duty because she would go to sleep and ignore the buzzer. The members of staff would try to listen for the buzzer and try to respond because on occasions when the claimant did respond to the buzzer she would be angry with the resident.

17. Mr Paul reported the allegations to Ms Joshi. He then commenced an investigation into the allegations by speaking to the other members of staff on night shift. The members of staff did not want to commit anything to writing because they were frightened, but they each told Mr Paul the allegations were true.

18. Mr Paul noted the staff members had named two residents, but he was unable to speak with either of them because they were no longer resident in the home. Mr Paul did speak very generally to the residents to ask if there were any problems they wished to report, but he could not go beyond this because most of the residents have dementia.

19. Ms Harland wrote a statement (page 38) reflecting what she had been told at the meeting with the two members of staff.

20. Mr Paul also wrote a statement (page 41) reflecting what he had been told at the meeting with the two members of staff. Mr Paul concluded his statement (page 45) by stating that having carried out an investigation he had come to an understanding the concerns were true in nature because all staff members
5 agreed to the concerns raised. He then set out 10 allegations based on the information he had obtained.
21. Mr Paul and Ms Harland met with the claimant on the 22 November 2017. The purpose of the meeting was to inform the claimant of the allegations, and
10 obtain her comments. Mr Paul told the claimant serious allegations had been made by two members of staff, and he started to go through the list of allegations as set out on page 45.
22. The claimant became angry and after approximately 10 minutes she got up,
15 told Mr Paul that she was *“not having this”* and that she had *“had enough”*. The claimant made reference to Mr Paul giving her one of his *“famous”* references, and told him she was not coming back. The claimant left.
23. Mr Paul understood the claimant had resigned. He wrote to her (page 29)
20 referring to the meeting which had culminated in her resignation. Mr Paul made reference to the fact the meeting had been to inform the claimant of allegations received about her conduct, and that she was suspended from duty whilst he considered her resignation. Mr Paul invited the claimant to contact him before the 29 November to let him know if she intended to return
25 to work. He noted that if he did not hear from her then he would have no alternative but to accept her resignation.
24. The claimant did not report for work but attended on the 29 November to
30 speak to Mr Paul, who confirmed she was suspended because of the investigation into serious allegations.
25. Mr Paul passed all of the information he had gathered to Ms Joshi because any disciplinary sanction would be her decision. Mr Paul included in the papers passed to Ms Joshi a statement/complaint dated 7 November 2017

from Ms Chucko (page 32) and a statement from Thomas (page 36). Mr Paul provided these statements to Ms Joshi because she had asked for everything to be given to her.

5 26. Mr Paul wrote to the claimant on the 11 December (page 31) to invite her to attend a formal disciplinary meeting on Wednesday 20 December.

27. Mr Paul and Ms Joshi were in attendance at the meeting on the 20 December. The claimant attended with her trade union representative Mr Fullerton. Ms
10 Joshi took a note of the meeting which was produced at page 46.

28. Mr Paul read out and explained each of the allegations to the claimant. The claimant requested a short adjournment, following which she responded “No” to each allegation. Ms Joshi confirmed she would be in touch in due course
15 regarding the next stage.

29. Ms Joshi decided to dismiss the claimant for gross misconduct. Ms Joshi concluded the allegations against the claimant were true. She considered the allegations were detailed and could not accept they may be made up or
20 malicious. Ms Joshi also took into account the fact the respondent has a responsibility to residents and staff, and concluded it would be unsafe to have the claimant back on the premises. She concluded the claimant’s behaviour had been in breach of the SSSC Codes of Practice, specifically not treating residents in a respectful, dignified and sensitive manner.

25 30. The claimant was advised of the decision to dismiss by letter of the 3 January 2018 (page 55). The letter referred to the allegations and the fact the claimant had been given an opportunity to respond to them but had said nothing. The claimant’s employment was terminated with immediate effect, but she was
30 paid 4 weeks’ notice.

31. The claimant appealed against the decision to dismiss (page 59). The grounds of appeal included that she had not been told of the allegations in full prior to the meeting on the 20 December; she had not been told of the dates

and times when the allegations were said to have occurred and she had not been provided with the statements taken during the investigation.

5 32. Ms Joshi considered the claimant's appeal. She did not arrange an appeal hearing, but instead considered each appeal point and responded to it in a letter dated 22 January (page 63). Ms Joshi rejected all of the appeal points.

33. The Acorn Park Care Home closed in September 2018 and all employees were made redundant.

10 **Credibility and notes on the evidence**

34. The claimant invited the tribunal to believe she had been asked to meet with Mr Paul for an informal chat on the 22 November. Mr Paul opened the meeting by saying "you've been to see a lawyer" and the claimant denied this. Mr Paul made reference to a racist comment having been made. He also referred to
15 a member of staff "Thomas". The claimant responded by saying to Mr Paul "see those famous references of yours, can I have one cause I'm looking for a new job. I'm not listening to this – I'm leaving."

35. The claimant was due to work that night but did not attend. She had decided
20 to leave because she could not trust the respondent and could not go to them with issues. However, her position was that she had not in fact resigned.

36. The claimant maintained she had not been told of the allegations against her. She had asked for details, but she had been told by Mr Paul that he could not
25 discuss it.

37. The claimant thought the meeting on the 20 December was to find out about the allegations. Mr Fullerton had asked Mr Paul what the meeting was about, and Mr Paul had responded it was an investigation.

30 38. Mr Paul read out the allegations and the claimant was shocked to hear them and asked for an adjournment. She subsequently responded "no" to each allegation because her representative asked her to do this.

39. The claimant did not know who made the allegations and only saw the statements in preparation for this Hearing.

5 40. I did not find the claimant to be an entirely credible witness. I preferred Mr Paul and Ms Harland's account of the meeting on the 22 November, and I found as a matter of fact that Mr Paul told the claimant allegations had been made against her, and started to read out the allegations. I could not accept the claimant's suggestion that she walked out of the meeting because Mr Paul "kept going on about Thomas", because it seemed an implausible reason for walking out of a meeting with the Manager and Deputy Manager.

10 41. I did accept (there being no dispute regarding this matter) that the statements of staff member A and B were not provided to the claimant at any point during the investigation or disciplinary process. I acknowledge this impeded the claimant's ability to respond to the allegations, and this is a point I deal with below. However, I found the claimant's approach of simply denying all of the allegations to be odd: there was no request for further information; no questions were asked and, once the claimant did receive the statements there was no explanation from her at this Hearing to cast doubt on what had been alleged, or why the allegations may have been made. There was, for example, no indication of what the claimant may have said had she been provided with the statements in advance of the disciplinary hearing.

15 20 42. I found Mr Fullerton to be a credible witness and I accepted his notes of the meeting on the 20 December (page 51) indicate he understood the meeting was an investigation and that there would subsequently be a disciplinary hearing.

25 30 43. I found Mr Paul to be a credible and reliable witness. He impressed as someone who not only took guidance and instruction from Ms Joshi, but who also acted independently because he is a registered Nurse and under a duty to address matters which come to his attention. The one issue where Mr Paul's evidence lacked clarity was with regard to interviewing residents of the home. Mr Paul suggested he had spoken to residents, but he accepted the

majority of residents had dementia. He then qualified his response to explain that he had spoken to residents in only the most general manner (for example, asking if there were any problems). Mr Paul however told the tribunal that residents with dementia may say one thing and then the complete opposite. Accordingly I concluded that although Mr Paul may have spoken very generally to residents, nothing of any value to the investigation came from that exercise.

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10 44. I also found Ms Harland to be a credible and reliable witness who gave her evidence in a straightforward and honest manner.

15 45. I found Ms Joshi to be a credible witness although she was at times unsure of her position. Ms Joshi was, for example, referred to her own notes of the meeting on the 20 December, and to a reference to “next stage – disciplinary hearing”. Ms Joshi simply dismissed this as “just my notes”. There was no explanation beyond this statement why that may have been in her notes, yet she did not proceed in that way.

20 46. I concluded, with regard to the evidence of Ms Joshi and Mr Paul, and the notes of Ms Joshi and Mr Fullerton, that the claimant and Mr Fullerton were given the impression on the 20 December that a further meeting would be arranged. However, Ms Joshi decided not to proceed in this way because the claimant failed to respond to the allegations and therefore there was nothing (in terms of any explanation) for Ms Joshi to consider.

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30 47. There was some evidence from Mr Paul and the claimant regarding reference, at the meeting on the 22 November, to a racist comment having been made. I found the evidence lacked clarity in terms of who was alleged to have made the comment and to whom. I, in any event, did not find this to be a material fact. I accepted there was some reference generally to a racist comment at the start of the meeting on the 22 November, but I accepted Mr Paul’s evidence that the meeting went on to deal with the core issue which was the allegations made against the claimant.

48. There were references throughout this case to what had, or may have, happened prior to the respondent taking over the running of the home. For example, (i) the fear of employees A and B and other staff was rooted in something which had happened previously; (ii) there was evidence the claimant had been moved from night shift to work in the laundry and (iii) Ms Joshi made reference in the letter of dismissal to the allegations not being isolated incidents.

49. There was, however, no evidence before the Tribunal regarding any (alleged) previous behaviour/incidents. I accepted employees A and B, and others, were frightened of the claimant but beyond this I could not make any findings or consider it further.

Respondent's submissions

50. Mr Edwards noted the claimant's case was based partly on unfair procedure, but he submitted the correct approach for the tribunal was to consider fairness overall because a defect on its own did not lead to unfair dismissal.

51. Mr Edwards invited the tribunal to find many of the allegations were put to the claimant at the meeting on the 22 November. He referred to the evidence of Mr Paul and Ms Harland who said the allegations of verbal abuse and physical abuse of residents and failure to answer the buzzer at night had been read out that day. Mr Edwards submitted the allegations were serious and it would be surprising if dismissal had not resulted.

52. The claimant denied resigning on the 22 November. She also denied the allegations had been read out. Her position was that she had left the meeting because of repeated reference to Thomas. Mr Edwards submitted this was a very vague reason for walking out, and an implausible reason for resigning. Furthermore, Mr Paul had sent the letter dated 22 November entitled "Resignation": why would he have made this up if it had not happened, particularly when he did not accept the resignation. The inference to be drawn from this must be that the claimant left because the allegations were put to her.

53. The allegations were put to the claimant in detail at the meeting on the 20 December. The allegations were taken from the statement of Mr Paul and were based on what he had been told during the interviews with employees A and B. It was submitted there had been no evidence of what the claimant would have told Mr Paul had she been shown the statements, and this was compounded by the fact the allegations contained the information in the statements. There was, it was submitted, no substantial defence to the allegations.
54. The reason for dismissal in this case was conduct, and so the **Burchell** test was appropriate. Mr Edwards submitted Ms Joshi formed a genuine belief the misconduct occurred, and this genuine belief was formed after a reasonable investigation had been carried out by Mr Paul who had spoken to A and B in person and the other employees on the night shift, who had agreed these things had happened. It was submitted that it was reasonable for Ms Joshi to form the belief the misconduct had occurred based upon the investigation which had taken place.
55. Mr Edwards referred the tribunal to **Taylor v OCS Group Ltd 2006 ICR 1602** where it was held the tribunal must focus on the statutory test set out in section 98 Employment Rights Act. The question is: was the reason for dismissal sufficient to dismiss and procedural fairness must also be considered.
56. In **London Central Bus Company v Manning UKEAT/0103/13** the question to be asked by the tribunal was set out as: did any defect in procedure deny the employee an opportunity to show the reason for deficient.
57. Mr Edwards submitted any procedural defects in the procedure followed by the respondent did not deny the claimant an opportunity to show the respondent's reason was not sufficient for dismissal. Ms Joshi said there had been ample opportunity for the claimant to answer the allegations.
58. Mr Edwards invited the tribunal to find the dismissal fair. However, if the tribunal found the dismissal unfair, it was submitted, in terms of **Polkey**, that

there had been no evidence from the claimant that anything she could have said at the time would have detracted from Ms Joshi's genuine belief in misconduct. In the claimant's evidence in chief she had suggested witnesses who could have been spoken to, but this was not put to Mr Paul, who in any event interviewed all staff on night shift. Further, the claimant had not suggested any reason why employees may have lied.

59. The employees A and B had made detailed statements; the night shift employees had agreed with the allegations and the claimant had only given a blanket denial of the allegations and no explanation of what having the statements would have enabled her to say in her defence. It was submitted that dismissal would have occurred if there had been no procedural defects. In the circumstances a Polkey reduction of 100% should be made.

60. Mr Edwards also invited the tribunal to make a reduction to compensation because of contributory conduct. He submitted the question to be asked by the tribunal was whether, on the balance of probabilities, the conduct did occur and if so, whether to reduce compensation in terms of both the basic and compensatory awards.

61. Mr Edwards submitted that on the balance of probabilities the tribunal can find the conduct did occur. An inference that the claimant knew what was being talked about on the 22 November could be drawn. Further, Mr Paul's report had concluded the allegations were true. The conduct was culpable and blameworthy and contributed to the dismissal. Mr Edwards invited the tribunal to make a 100% reduction to both the basic and compensatory awards because the conduct was of such a nature that it would not be fair to allow the claimant to receive compensation.

Claimant's submissions

62. Ms Osbourne referred to section 98 Employment Rights Act and to the test set out in **British Home Stores Ltd v Burchell 1978 IRLR 379**. Ms Osbourne also referred to **A v B 2003 IRLR 405** as authority for the requirement, in

relation to the standard of investigation required, to consider the possibility that the claimant would never work again in their chosen field.

5 63. Ms Osbourne submitted the respondent did not have a genuine belief in the alleged misconduct. The claimant had a meeting with Mr Paul prior to being advised allegations had been made against her at which he made clear he was not happy with her raising the issue of him accusing her of racism. The timing of this meeting and the lack of evidence of any investigation suggests that Mr Paul acted on his own initiative to try to build a case against the claimant by canvassing employees for evidence which he then wrote up in a report. Ms Joshi then made a decision without considering whether the allegations were true, based on her concern about how the allegations would impact on her as responsible for the home and to the Care Inspectorate. It was submitted there were no reasonable grounds for that belief and a reasonable investigation was not undertaken.

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64. Ms Osbourne invited the tribunal to attach little weight to the evidence of Mr Paul because when he was asked about the meeting on the 22 November he did not mention the issue of the allegation that a racist remark had been made by him. In cross examination he admitted this had been discussed in the meeting but denied he had accused the claimant of seeking legal advice. There was no clarity regarding the reason why this issue had been raised at all at this meeting.

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25 65. Mr Paul had also been inconsistent regarding the number of allegations read out to the claimant on the 22 November.

66. Mr Paul was evasive when answering questions about when the investigation began. He said he was told by Ms Joshi to investigate a few days prior to the 22 November, but the statements from A and B pre-date this. He did not record any conversations with other staff (if indeed other staff were spoken to). He referred to residents being questioned generally but this did not sit comfortably with the evidence that most residents had dementia. He failed to provide any good reason for failing to get evidence from the claimant.

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67. Ms Harland's evidence regarding the meeting on the 22 November was that she had no knowledge of the issue of the racist remark being discussed. This called into question the reliability of her evidence, particularly when she had worked with the claimant and had never been aware of her having carried out any of the acts alleged by A and B.

68. Ms Osbourne submitted the claimant's evidence had been clear and consistent. She repeatedly advised in cross examination that she had not provided any further response to the allegations on the advice of her trade union representative.

69. Mr Fullerton was a straightforward witness and spoke to his note that the meeting on the 20 December was an investigation and that the next step would be a disciplinary hearing. He also requested copies of the statements.

70. Ms Osbourne submitted, with regard to the investigation, that the framing of the disciplinary charges was unspecific with no detail provided of when these allegations were said to have occurred. The claimant could not respond to the allegations in that format. There was no good reason why the claimant could not have been provided with sufficient detail of the case against her. It was submitted that generalising the allegations under the headings of "conduct, communication and work ethic" rendered the process fundamentally unfair.

71. Mr Paul did not carry out a fair investigation: he did not interview the claimant and there were various other staff members to whom he could have spoken. There was also no evidence to suggest Mr Paul carried out any investigation after the 29 November. His remit was unclear in circumstances where he appeared to have gathered information to provide to Ms Joshi, and make conclusions in his report.

72. There was no evidence to suggest Mr Paul carried out any critical questioning of the witnesses. There was nothing to suggest he carried out any form of analysis of credibility or reliability. He appeared simply to have accepted at

face-value what those who made the allegations against the claimant have said.

- 5 73. It was submitted the investigation process was so fundamentally flawed that it could not meet the requirement of being a reasonable investigation.
- 10 74. Ms Joshi fell into the same errors as Mr Paul in that she failed to critically analyse or test the evidence. There was no proper consideration of the evidence before Ms Joshi and she could not have reasonably reached the conclusion the claimant was guilty of the misconduct in question. Ms Joshi did not conduct the meeting on the 20 December: she did not ask any questions. She could not have come to a reasonable conclusion about the conduct of the claimant when she failed to address the allegations or question the claimant.
- 15 75. The claimant was advised the meeting was an investigation and that she would have the opportunity to attend a disciplinary meeting after seeing the statements and evidence. This did not happen and, it was submitted, accordingly the meeting should not have resulted in disciplinary action being taken.
- 20 76. The complete failure of the respondent to raise the allegations clearly and expressly in the Investigation Report, in the invitation to the disciplinary hearing and the failure to hold a disciplinary hearing rendered the dismissal procedurally unfair as the claimant would not be on proper notice that she had to address these matters.
- 25 77. Ms Joshi stated she took into account all of the statements from staff in reaching her decision to dismiss. However, the letter of dismissal also made reference to Ms Joshi being aware these were not isolated incidents. This statement was made in isolation with nothing to explain or support it.
- 30 78. Ms Osbourne submitted that in the circumstances the conclusion reached by Ms Joshi was not one which could reasonably be reached.

79. The failure to convene an appeal hearing was a breach of the ACAS Code of Practice.

5 80. Ms Osbourne invited the tribunal to find the dismissal was not within the band of reasonable responses. There was no evidence of previous conduct issues and no previous warnings issued to the claimant, who had 16 years' service.

10 81. Ms Osbourne submitted that any **Polkey** reduction should be minimal. The claimant, if she had been invited to a disciplinary hearing, with advance notice of the allegations and evidence against her, would have asked for details of who the residents were and the dates of the alleged acts. As no evidence had been provided to allow her to do this, the required investigation was not carried out and so it simply cannot be determined from the evidence that had the correct procedure been followed the claimant would have been dismissed.

15 82. The tribunal would, it was submitted, require some form of evidential basis to come to a view that the claimant engaged in blameworthy conduct. Ms Osbourne submitted that given the fundamental flaws and gaps in the evidence gathered by the respondent in the disciplinary process, the tribunal could not reach such a conclusion. The claimant's evidence should be preferred to that of A and B and accordingly there would be no evidential basis
20 to conclude the claimant engaged in blameworthy conduct, and no reduction for contributory conduct should be made.

Discussion and Decision

25 83. I had regard firstly to the terms of section 98 Employment Rights Act which provides:

“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

30 *(a) the reason (or, if more than one, the principal reason) for the dismissal and*

(b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

5 (2) *A reason falls within this subsection if it –*

(b) *relates to the conduct of the employee ...*

...

10 (4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

15 (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."*

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84. The first issue for the tribunal to determine is whether the respondent has shown the reason for dismissal. The respondent in this case admitted the claimant had been dismissed and asserted the reason for dismissal was conduct, within section 98(2)(b) above. The claimant challenged this by
25 suggesting the respondent had not had a genuine belief in the misconduct and that Mr Paul had tried to build a case against the claimant by canvassing employees for evidence which he had then written up in his report.

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85. I could not accept Ms Osbourne's submission that Mr Paul had canvassed employees for evidence for two reasons: firstly, because it was not put to Mr Paul in cross examination and secondly, because I found the evidence of Mr Paul, supported by Ms Harland, to be credible when they said that two employees had approached them with complaints about the claimant. There

was nothing in the evidence of Mr Paul or Ms Harland to suggest a grudge against the claimant.

5 86. The issue of whether the respondent had a genuine belief that the claimant did what was alleged is dealt with below, but I concluded the respondent did genuinely believe the claimant did what was alleged.

10 87. I concluded, having had regard to these matters, that the respondent had shown the reason for dismissal was conduct, which is a potentially fair reason falling within section 98(2)(b) Employment Rights Act. I must now continue to determine whether dismissal for that reason was fair.

15 88. I was referred to the case of **British Home Stores Ltd v Burchell** (above) where it was held that *“what the tribunal has to decide is whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time”*. It must be established by the employer that it did believe it; that it had in mind reasonable grounds upon which to sustain that belief and, at the time he formed that belief on those
20 grounds, the employer must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

25 89. I had regard to the investigation carried out by the employer. I accepted Mr Paul’s evidence, supported by Ms Harland, that two employees approached them regarding serious concerns about the claimant. I also accepted the employees wanted to meet and talk off-site because they were frightened of the claimant. Ms Harland took notes of what was said, and the statements of employee A and B were produced.

30 90. Mr Paul investigated what he had been told by employee A and B by speaking to all other staff on night shift. The employees were not willing to make a written statement but, when advised of the allegations, they confirmed them to be true. Mr Paul confirmed two residents had been named by employee A and B, but they had since left the Home and could not be interviewed. Mr Paul

spoke very generally to the residents, but nothing could be gained from them due to their medical condition.

5 91. The claimant, in her evidence to the tribunal, suggested there were people whom Mr Paul could have interviewed. The claimant had not previously raised this with Mr Paul at any time during the disciplinary process and I noted this was not put to Mr Paul. I also noted, more importantly, the claimant did not explain what information the witnesses may have had: there was no suggestion they would have said anything other than a denial on the
10 claimant's behalf.

92. Ms Osbourne was critical of Mr Paul's investigation because he had not sought details from employee A and B of where and when these alleged incidents had taken place. There was, for example, no information regarding
15 dates. Mr Paul acknowledged there were no dates to say when things happened, and he explained that that was not unusual because often staff did not see a manager at the time to whom they could report the incident.

93. I had regard to the fact the onus on the employer is to carry out as much
20 investigation as is reasonable in the circumstances of the case, and to gather all the available evidence. I considered "available" to be the critical word in the circumstances of this case. This was not a case where Mr Paul failed to investigate points which he could have investigated: rather, it was a case where the investigation was limited by the fact members of staff would not
25 come forward to provide a written statement, the residents named in the allegations had left the Home and the current residents were unable to assist.

94. I acknowledged the allegations did not provide details of dates when incidents
30 were said to have occurred, and did not provide details of the "staff members" said to have been verbally abused, or who had witnessed incidents. I noted, however, there was no suggestion that Mr Paul could, with a more detailed investigation have obtained the dates of alleged incidents.

95. I also inferred from the statements of employees A and B which referred to all the members of staff being frightened of the claimant, that the members of staff who had witnessed incidents had deliberately not been named in the statements. I considered this inference was supported by the fact that when
5 Mr Paul spoke to the night shift employees they did not want to commit anything to writing.

96. I considered, based on the evidence before me, that Mr Paul did what he could to investigate what he had been told.

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97. Mr Paul and Ms Harland met with the claimant on the 22 November to inform her of the allegations and obtain her side of the story. I found as a matter of fact that the claimant was told allegations had been made against her which were serious, and which concerned her conduct. I accepted Mr Paul read out
15 a number of the allegations to the claimant before she cut the meeting short by leaving.

98. Mr Paul did not invite the claimant to meet with him again before the disciplinary hearing. He did not take the opportunity to talk to the claimant
20 about the allegations on the 29 November. I acknowledged the claimant walked out of the meeting on the 22 November, and (arguably) resigned from her employment. However, as at the 29 November it was clear the claimant either had not resigned, or her resignation had not been accepted by the respondent. I considered the failure of the respondent to meet with the
25 claimant prior to the disciplinary hearing on the 20 December to put the allegations to her and obtain her side of the story, or to confirm in writing the detailed allegations was a flaw which I deal with below.

99. I decided, having had regard to all of the above points, and with the exception
30 of the failure to interview/inform the claimant of the allegations, that Mr Paul carried out as much investigation into the matter as was reasonable in the circumstances.

100. Ms Osbourne was critical of Mr Paul's Investigation Report because he included his conclusion that he found the allegations to be true. Ms Osbourne submitted the inclusion of conclusions was a flaw and blurred the decision-making process. I could not accept that criticism in circumstances where there was no policy or procedure setting out the remit of the person undertaking the investigation. Furthermore, there was no suggestion Mr Paul's conclusion persuaded or influenced Ms Joshi.

101. I next had regard to the question of whether Ms Joshi had reasonable grounds upon which to sustain her belief that the claimant did what was alleged. A number of procedural points impact on this and so it is appropriate to deal with them here. The claimant argued that she had not been provided with details of the allegations or the statements of employees A and B. These points were well made. I, as stated above, found the claimant was advised on the 22 November that serious allegations had been made against her, and she was advised of a number of the allegations. The claimant, however, did not know the full extent of the allegations against her prior to the disciplinary hearing on the 20 December. The claimant was also not provided with the statements of A and B.

102. I acknowledge Mr Paul read out the allegations at the disciplinary hearing, but I considered this was not sufficient. The allegations were detailed and numerous and it was unreasonable to expect the claimant to respond immediately to those allegations. The flaw of failing to put the allegations to the claimant prior to the disciplinary hearing, or provide them to her in writing, meant that the first time the claimant heard the full and detailed extent of the allegations was at the disciplinary hearing.

103. I referred (above) to the fact the investigation carried out by Mr Paul was reasonable but lacked specific details regarding dates when incidents were alleged to have occurred, and details of witnesses. The allegations were general. I considered that in those circumstances the importance of giving the claimant details of the allegations in advance of the disciplinary hearing

became even greater. The claimant would need time to think about what was being said before she could respond to it.

5 104. The approach of the respondent (and the effect of the flaw in procedure) meant the claimant could only deny each allegation.

105. Mr Paul was asked twice in cross examination why he had not provided the statements of A and B to the claimant and/or her representative. He responded on both occasions to say the statements had not been requested.
10 Ms Joshi told the tribunal the statements had not been given to the claimant because employees A and B did not want the claimant to see them.

106. I accepted with regard to employees A and B that they were frightened of the claimant and it was for this reason that they did not want to speak to Mr Paul
15 and Ms Harland at the Home, and did not want to have their names attached to the statements or indeed the names of any other employees. I accepted the need of the respondent to protect the identity of employees A and B, but there was no suggestion that providing the statements to the claimant would risk revealing their identity.

20 107. I concluded that if the respondent did not wish to provide the statements to the claimant, there was an onus on them to either read out the statements to the claimant, or provide to her as much information from the statements as was possible.

25 108. Ms Joshi told the tribunal that in reaching her decision to dismiss the claimant she took into account the statements from employees A and B, the fact night shift staff had confirmed the allegations to be true and the fact the claimant had offered no response/information for her to consider. I must ask whether
30 Ms Joshi had reasonable grounds upon which to sustain her belief that the claimant was guilty of the allegations. I have acknowledged the flaw in the respondent's procedure meant the claimant could not respond in detail to the allegations. The evidence before Ms Joshi was, on the one hand, the statements of employees A and B, supported by the night shift employees

and, on the other hand, the claimant's denial. I considered that in those circumstances Ms Joshi had reasonable grounds upon which to sustain her belief that the claimant was guilty of the allegations. Ms Joshi believed the claimant had acted as alleged, and she had reasonable grounds upon which to sustain that belief based on what employees A and B (and the other night shift staff) had said.

109. I must now continue to determine whether dismissal for this reason was fair or unfair. I had regard to the case of **Iceland Frozen Foods Ltd v Jones 1983 ICR 17** where the EAT set out the correct approach for the tribunal to adopt when answering the question posed by section 98(4) Employment Rights Act. It was stated:

"(1) the starting point should always be the words of section 98(4) themselves;

(2) in applying the section a tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct a tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case 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."

110. I also had regard to the case of **Polkey v A E Dayton Services Ltd 1988 ICR 142** which firmly established procedural fairness as an integral part of the reasonableness test under section 98(4).

5 111. There were a number of procedural failings in this case. I referred above to the fact the claimant was not aware of all of the allegations prior to the disciplinary hearing and had not been provided with copies of the statements of employees A and B, or provided with details of the information in those statements. I had regard to the ACAS Code of Practice which states that the
10 employer should inform the employee in writing of the charges against him/her and the possible consequences of the disciplinary action. This should contain enough information to enable the employee to prepare an answer to the case.

112. I also referred above to my conclusion that these failings impacted on the
15 claimant's ability to respond to the allegations. The claimant was only able to deny the allegations and accordingly this was all Ms Joshi took into account when considering the sanction to impose.

113. Mr Edwards referred me to the case of **Taylor v OCS Group Ltd** where it was
20 held that earlier procedural defects can be cured at the appeal stage.

114. I noted the claimant had, by the time of making her appeal, heard the allegations read out at the disciplinary hearing and seen them in writing in the letter of dismissal. I was satisfied the earlier defect of not being aware of the
25 allegations was cured at that stage and prior to the appeal. However, the respondent did not arrange an appeal hearing to determine the claimant's appeal. Ms Joshi considered and responded to the claimant's appeal in writing without hearing further from her. I considered this to be a further procedural error. The respondent had an opportunity to cure earlier defects at the appeal
30 stage but failed to take that opportunity and in fact compounded the earlier errors by failing to arrange a hearing to determine the appeal.

115. I must ask whether the respondent's decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might

adopt. I decided the decision fell outside the range of reasonable responses which a reasonable employer might adopt because the procedural errors rendered the decision to dismiss unfair. The claimant did not know the allegations she faced prior to attending the disciplinary hearing; she had not had sight of the statements of A and B; she had no time to consider and prepare a response to the allegations and notwithstanding the claimant knew the detailed allegations prior to the appeal hearing the respondent compounded earlier flaws by failing to arrange an appeal hearing. In those circumstances I decided the decision to dismiss was unfair.

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116. I must now turn to consider, in terms of **Polkey**, whether the claimant would still have been dismissed even if a fair procedure had been followed. The claimant did not, either in the letter of appeal, or at this Hearing, give any indication what she would have said in response to the allegations if she had been in possession of all of the information. The claimant did not have sight of the statements prior to the appeal hearing, but she did have sight of them for this Hearing. The claimant told the Tribunal that if she had details of the allegations and the statements prior to the disciplinary hearing, she would have responded to the allegations: she did not expand on what her response may have been. I noted the claimant did not suggest employees A and B were lying or that that they had a motive for making up the allegations. There was, accordingly, nothing to put into the balance when considering this matter.

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117. I had regard to the fact the respondent operated a care home for elderly residents. This is a heavily regulated environment where the highest standards of care are expected. I considered this would weigh heavily with the respondent and their response to these allegations.

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118. I concluded that even if the claimant had been provided with written details of the allegations against her, and copies of the statements prior to the disciplinary hearing, she would still have been dismissed by the respondent. I say that because of the nature of the allegations, the fact the respondent had statements from two employees and the fact night shift employees had confirmed the allegations to be true. I considered there would be an 90%

chance of dismissal. I could not accept it would, as suggested by Mr Edwards, be 100% because there must be scope for the chance the claimant may have brought something forward to explain or mitigate her actions.

5 119. The effect of my decision is that the compensatory award would be reduced by 90%.

120. I must also consider whether the claimant contributed to her dismissal. Section 123(6) Employment Rights Act provides that *“where a tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding”*.

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121. I had regard to the case of **London Ambulance Service NHS Trust v Small** 15 **2009 IRLR 563** where the Court of Appeal held that a tribunal was bound to make findings of fact about the employee’s conduct for the purposes of deciding the extent to which his conduct contributed to his dismissal.

122. Mr Edwards invited me to draw an inference from what happened on the 22 20 November to find the claimant did know what was being discussed, and that accordingly, on the balance of probabilities, conclude the conduct did occur. I was not prepared to accept that submission. I have set out above the procedural errors of the respondent. I considered that if I adopt the approach suggested by Mr Edwards I would fall into the same errors as the respondent. 25 I am not able, on the basis of the evidence before me, to make findings of fact about the claimant’s conduct for the purposes of deciding the extent to which her conduct contributed to her dismissal. I accordingly decided not to make any reduction to the compensatory award because of contributory conduct.

30 123. Section 122(2) Employment Rights Act provides that the tribunal may reduce the amount of the basic award where it considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to do so. The wording of this section makes it clear that it is not necessary

that the employee's conduct should have caused or contributed to the dismissal.

5 124. I found as a matter of fact the claimant ended the meeting on the 22 November by telling Mr Paul she had had enough, wanted one of his famous references and left. The claimant, by her actions, stopped Mr Paul from going through the detail of the allegations with her, and curtailed her opportunity to respond to the allegations or request further information. Further, the claimant did not attend for her next shifts, and the respondent did not know whether she
10 had resigned or whether she intended to return to work at some point. I considered it would be just and equitable to reduce the basic award because of this conduct. I decided it would be just and equitable to reduce the basic award by 75%.

15 125. I, in conclusion, decided the claimant was unfairly dismissed by the respondent. I further decided the basic award should be reduced by 75% because of the claimant's conduct at the meeting on the 22 November and her subsequent failure to attend for work, and that the compensatory award should be reduced by 90% because of the application of the **Polkey**
20 principles.

25 **Employment Judge: Lucy Wiseman**
Date of Judgment: 15 January 2019
Entered in register : 16 January 2019
and copied to parties