



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

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Case No: S/4101591/19 Held on 29 May 2019

Employment Judge: J M Hendry

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Miss T Cameron

Claimant  
Represented by:  
Mr F H Lefevre  
Solicitor

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Care Concern Limited

Respondent  
Represented by:  
Mr E McFarlane –  
Consultant

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

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The Judgment of the Tribunal is that the claimant's application for a finding that she was unfairly dismissed succeeds and that the respondent shall pay the claimant a monetary award of amounting to Four Thousand Seven Hundred and Twenty Nine Pounds and Thirty Three pence (£4729.33) made up of a basic award of £775.38 and a Compensatory award of £3953.95.

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### **REASONS**

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1. The claimant in her ET1 contended that she had been unfairly dismissed from the employment as a care assistant with the respondents. Their position was that the dismissal was fair on the grounds of her misconduct. The claimant had been dismissed for gross misconduct.

#### **Issues**

**E.T. Z4 (WR)**

2. The issues for the Tribunal were whether or not the claimant's dismissal was fair or unfair and in particular whether a fair procedure had been followed, whether there had been sufficient investigation into the matter and whether the evidence before the respondents was sufficient to allow them to dismiss her having regard to the range of reasonable responses open to an employer.

### **Evidence**

3. Parties had lodged a joint bundle of documents (JB1-68). At the outset of the Tribunal an issue arose that one of the witnesses Gary Bowes was not present and had apparently indicated to the respondents that he was unwell. In the event neither side sought a postponement to hear his evidence and the case proceeded.

4. The Tribunal heard evidence from the following witnesses on behalf of the respondents:-

- Elaine Crawford, Home Manager;
- Anthony Douglas, General Manager and
- Joseph Janikowski, Area Manager

The claimant gave evidence on her own behalf.

### **Facts**

1. The claimant is 23 years of age. She had worked as a care assistant with the respondents in their care home the "Cathey Care Home" in Forres from 23 August 2016 until termination of her employment on the grounds of gross misconduct on 31 October 2018.

2. The claimant worked 44 hours per week. Her rate of pay was £7.20 when she started work and £8.50 when her employment terminated. She was also in a Pension scheme. Her employers contributed £23.54 per month to it and she contributed £28.25 per month. Her net monthly remuneration was on average £1449.43 (JBp165). Prior to termination of her employment the

claimant also worked casually as a care worker through an agency 'Aberness Recruitment' earning £256.46 net per month.

3. The claimant was involved in training during her employment. This included online training. The claimant also commenced study for a SVQ qualification in residential social care but did not complete it.
4. The respondents also carried out staff supervision. Staff supervision records were produced (JBp 35-38).
5. The respondents have various policies including a disciplinary procedure. The respondent's disciplinary procedure is produced (JB 39-45). It is available at the nurses' station and in the manager's office in the home.
6. The claimant received a statement of her main terms and conditions of employment (JBp 46-54). Periodic evaluations were carried out by the respondents as part of training and development (JBp 55-64).
7. The claimant was experienced in her role and had a clean disciplinary record.
8. In late 2017 the claimant applied for a senior carer vacancy and after interview was unsuccessful. The then manager, Joe Douglas wrote to the claimant on 18 December advising her that she had been unsuccessful and noting; "...it would be appropriate to sit down with you after a three month period to discuss your progress and that should another senior carer post become available and that you have achieved the aspirations set above, we would look to place you in an acting senior role for a three month probationary period."
9. The respondents operated a shift pattern. There were two or more carers on shift along with a team leader and a qualified nurse. The home has 41 beds and caters for elderly people occupying 24 hour care. This also

includes patients with dementia. The nearest “sister” home” by the respondents is in Aberdeen.

5 10. In about the middle of 2018 a Mr Gary Bowes joined the respondents as a care assistant. He occasionally worked with the claimant and they were on friendly terms.

10 11. On 20 September 2018 Mr Bowes was working with another employee Ms L Partington. She later reported to the respondents that in the course of interacting with a patient Mr Bowes had indicated that the claimant had used her finger to help a resident’s bowels move. Ms Partington was concerned about this matter and brought this allegation to the attention of Ms Elaine Crawford, the home manager. Ms Crawford asked Ms Partington to prepare a statement which she did (JBp. 79). It was in the following terms:-

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20 *“Myself and (colleague) were assisting a resident to the toilet when he stood her up. We noticed that she was constipated and we sat her back down on the toilet. At this point (colleague) then reported to me that Toni had assisted someone with their constipation before and using his hands he gestured how she had done so. With his left hand he cupped his fingers round in a circle and then with his right hand he pushed his fingers through the left hand and gestured a grabbing and pulling out motion.”*

25 12. Mr Bowes was contacted and asked to provide a statement which he did on 21 September:

30 *“(the resident) was on a commode (in sling) but was getting very agitated, so Toni and I proceeded to hoist (the resident) on to her bed. While we were hoisting (the resident) I had noticed that her bowels were still open and mentioned this to Toni. Toni bent her head underneath to have a look while I went to the top end as (the resident) was still quite agitated. I then saw Toni’s arm go underneath and her hand came away with faeces in her hand. I did not see Toni’s hand enter (the resident’s) bowels. Just her hand come away from it.”*

35 13. Ms Crawford took advice from the company’s HR providers who were later involved in providing support to the respondent’s managers. She decided

to suspend the claimant. Manual evacuation of a patient was not an authorised procedure for care staff.

14. The claimant was due to start a shift on Saturday the 22 September. Ms Crawford did not want to suspend the claimant at the home when she arrived for work. She decided to write to the claimant. She prepared a letter which was "pp'd" on her behalf by administrative staff. She also contacted the claimant through her personal mobile telephone. She eventually spoke to the claimant at 6pm on Friday the 21 September and told her that she was suspended. She did not give any reasons for the suspension.

15. The claimant later received a letter dated 20 September 2018. Although the letter indicated that a copy of the disciplinary policy and procedures was enclosed the document was not enclosed. The letter was in the following terms:

*"Dear Toni,*

*I am writing to confirm that with effect from 20 September 2018, you are suspended from duties pending further investigation. This disciplinary action is being taken based on the following policies breached:*

1. *Bowel Management Policy;*
2. *Adult Protection Policy.*

*Your suspension is not disciplinary action and does not indicate that we assume you are guilty of the alleged conduct. Your ongoing suspension will be kept under review and we will keep the suspension brief as reasonably practicable."*

16. The letter went on to confirm that the claimant would receive her normal salary but must not contact any staff, home residents or relatives. The letter continued:

*"Following our investigation, we believe there is a case to answer, we will write to you to confirm that a disciplinary hearing will be held and the details of the allegations. You will be provided with the evidence that we rely and will have the opportunity to respond to the allegations at the hearing in accordance with the disciplinary policy procedure. Otherwise, if there is no*

*case to answer then we write to confirm that your suspension is at an end without further actions. If you believe you need access to the premises or computer systems to identify relevant evidence, please let me know as we may agree to arrange this under supervision.”*

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17. When the claimant was suspended Ms Crawford did not know the date of the alleged incident in which the claimant had been involved.

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18. Ms Crawford wrote to the claimant again on 24 September requiring her to attend an investigatory meeting (JBp 81-82).

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19. The claimant attended the investigatory meeting on 28 September with a colleague. In the meantime, she had taken advice from her trade union and had prepared a number of written questions she wanted to ask at the meeting (JBp 90/91).

20. Ms Crawford also prepared questions for the claimant. (JBp 84).

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21. The meeting took place on 28 September. Notes were taken (JBp 85-88) which were signed by the claimant as accurate. The claimant was accompanied by her colleague Lorraine Watson. The claimant was told that the meeting was concerning the allegation *“that you assisted a resident who had constipation by performing a manual evacuation procedure”*.

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22. At the outset of the investigatory meeting the claimant denied being involved in any manual evacuation. When asked why she thought the colleague who was suggesting she had done this. She responded: “Don’t know. No Idea. Think its malicious.” She denied having seen the Bowel Management Policy and requested a copy. Ms Crawford then indicated that she would discuss matters with HR and make a decision to move forward. The claimant asked what the date of the incident was and who was involved. Ms Crawford responded that she did not have the date. Ms Crawford became discomfited at being asked questions by the claimant. When asked what a manual evacuation was Ms Crawford indicated that she wasn’t going to explain and

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that as this was becoming an investigation on her she would stop the meeting which she did. Ms Crawford went to take advice. In her absence the claimant handed over to the notetaker a list of questions that she wanted responded to. She also indicated that the questions had been prepared with the assistance of her trade union representative.

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23. In response to the investigatory meeting Ms Crawford decided to investigate further. She spoke once more to Mr Bowes. The meeting was minuted. She asked him when the incident had occurred and he said four to five weeks ago (JBp 89). The following further information was noted:

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*"We lifted her up and her bowels were open: we put her back down and I said I would rather do that than do what Toni does and she said what does she do. I said she dug it out."*

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24. The respondents wrote to the claimant on 2 October responding to her list of questions. The first question was answered in the following terms:

*"1. At the time of the meeting we did not have a date, however we have subsequently held a further meeting with the individual who submitted a statement and has been advised that this incident took place some four to five weeks ago."*

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25. The letter also purportedly enclosed a copy of the Bowel Management Policy and Disciplinary Policy. The copy was once more not enclosed.

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26. Ms Crawford as investigating officer passed the interview notes and other documents to Mr Anthony Douglas. Mr Douglas is an experienced home manager. Although his title was General Manager he was the home manager of an establishment in Aberdeen run by the respondents and the same level of management as Ms Crawford. Mr Douglas is a qualified registered mental health nurse and had been a manager with the respondents for a year. He had limited experience in disciplinary matters.

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27. Ms Crawford wrote to the claimant on 8 October inviting her to a disciplinary hearing. The letter stated:

5            *“The purpose of the meeting is to discuss your alleged misconduct and that you have seriously and deliberately breached the Care Home’s Bowel Movement Management Policy and the Home’s Adults Protection Policy whereby you performed a manual bowel evacuation on a resident who does not have capacity between the period of 1 August 2018 and 15 September 2018.”*

10        28.        The letter enclosed copies of the Bowel Management Policy, Adult Protection Policy, Disciplinary Procedure Policy and Witness Statements. The claimant was reminded of her right to be accompanied.

15        29.        In terms of the respondent’s Bowel Management Policy at page 101 staff were advised that manual evacuation by nursing staff was no longer an approved procedure. The protection policy protected patients from assault. The resident involved in the incident had no capacity and accordingly the respondents deemed the manual evacuation as being physical abuse at page 104.

20        30.        The original date of the disciplinary hearing was postponed but it took place on 16 October 2018. The claimant was accompanied. Notes were taken and agreed as accurate (JBp 114-119).

25        31.        Prior to the disciplinary hearing the claimant prepared and lodged a statement of events with the respondents (JBP110). She wrote:

30            *“I remember the day Garry and I were in (the resident’s) bedroom. We had been assisting her to the toilet so she could move her bowel. We used the full body hoist to put her on the toilet. She was quite badly constipated, so she was very agitated when using the toilet, crying and hitting out at us. She had been on the toilet for a little while, so we hoisted her up to see if she was finished using it, as she was unable to tell us. When we hoisted her up Garry stood by her where she could see him, offer her reassurance and to try and keep her calm. I bent down below the hoist to see if (resident) needed more time to use the toilet as there was no faeces in the commode. When I bent down I used one hand to gently pull her bum cheek to one side to get a better look. She had a bowel movement half way out. So when I put my hand on her bum cheek I got faeces on my glove. It is likely the*

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*gloves were a size extra large as for a while that's what was being put out in the rooms, and as I only have small hands the extra large gloves are much longer than my fingers. I realised (resident) still needed to use the toilet so we sat her back on the commode to finish. At no point did I manually evacuate (the resident) my hand and/ or fingers did not enter her bowel. Garry's statement says 'I then saw Toni's arm go underneath and her hand come away with faeces in her hand. I did not see Toni's hand enter (the resident's) bowels. Just her hand come away from it'. Therefore there is no evidence of a manual evacuation."*

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32. At the hearing the claimant denied that she had carried out a manual evacuation. She also once more suggested that the complaint was malicious. She suggested that if she breached the Policies then she would have been reported that day. She pointed out that the statement from Mr Bowes was inconsistent with his later statement.  
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33. The disciplinary hearing took place at the Cathey Nursing Home.

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34. Mr Douglas considered the paperwork available to him. He came to the view that the claimant honestly believed that she did not carry out the act complained of. He found it difficult to choose between the two versions of events. He prepared a note of his thoughts on 19 October which he then sent to Ms Crawford (page 121):

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*"Elaine from the disciplinary record I have made the following notes. TC continues to deny the allegation, stating that she had not carried out the procedure as indicated from the statements. The main statement is dated 21 September, one day after the date of suspension.*

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*TC believes that the second statement is hearsay and borders on malicious rumormongering; she made reference to being able to identify both the authors of the statements and the individual resident about this information being redacted.*

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*TC believes that the matter should have been discussed with her directly by the team leader who had been made aware of the allegation prior to suspension.*

*TC believes that she was not fully advised of the disciplinary procedure. The suspension after the fact did not comply with the policy statement.*

TC suggested that if the matter had been considered as serious, it would have been within the scope of AS and P Policy to have allowed her to work six weeks after the alleged event.

5 TC advises that, in accordance with the Bowel Management Policy she did in fact notify the nurse at the time of the individual's experience of constipation.

TC advises that she routinely adheres to policy procedure.

10 On reviewing progress notes of the individual, there is little reference to bowel activity, including reports made to senior staff regarding constipation. On reviewing TC's personal file, there is evidence of supervision requiring her to adhere to and comply with Policy and Procedure in respect of recruitment audits carried out within the scope of her role; a fact that contradicts her insistence that she was regularly compliant.

15 Whilst I appreciate and remain confident of the fact that you have concerns as to the actions of TC in respect of future safe guarding and competency issues, actual proof or evidence that the alleged act was carried out rests on the statement of an inexperienced colleague and the circumstantial report made to a further colleague. Dismissal on the grounds of misconduct or gross misconduct, as you have indicated would be an appropriate action, would in doubtably result in appeal. My hope was to have spoken through these facts with Sunny Dail, HR, with a view to seeking guidance as to the grounds of a final written warning with the specific parameters and conditions which would also lead to monitoring and safeguarding the residents and the organisation..... My recommendation would therefore be  
20 a final written warning; an expectation that all essential training is required for the role, be completed within a specified timescale; in addition Incontinence Care, Diet and Nutrition, Person Centred Care, Record Keeping, Stress and Distress, Tell Someone; a reflective account to be  
25 uploaded to SSSCPRTL; scheduled supervisions structured to support compliance with expected outcomes within the scope of the role.”  
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35 35. The incident had been reported to the SSSC who licensed the home and who are the regulatory body for the care sector. They had begun their own investigation.

36. Mr Douglas was in further contact with Ms Crawford. Mr Douglas in particular e-mailed on 31 October:

40 “Hi Tony

Can we please proceed to dismiss.  
If you want to discuss then happy to do so.”

37. Mr Douglas changed his mind that a warning was appropriate and agreed to dismiss given the position taken by Ms Crawford. He accordingly wrote to the claimant on 31 October terminating her employment on the grounds of gross misconduct (JBp 127).
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38. The claimant appealed. The matter was referred to Mr Joe Janikowski, Area Manager. Mr Janikowski was experienced in care and worked his way up through the ranks to senior management.
- 10 39. He considered the various papers that had been generated. He was not aware of the correspondence between Mr Douglas and Ms Crawford.
40. Mr Douglas had checked the claimant's e-learning records and was confident she was an experienced care worker. She should have been aware that manual evacuation was not approved.
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41. An appeal hearing took place on 4 December 2018. The claimant attended. Notes were prepared (JBp 150-154) which parties agreed were accurate.
- 20 42. At the appeal the claimant argued that she did not carry out the conduct alleged.
43. Mr Janikowski considered the papers and the comments made by the claimant. He wrote to her on 13 December rejecting her appeal. He accepted that there was evidence that she had carried out a manual evacuation of the resident in breach of the company's policies. He did not regard any difficulties with the process such as the timing of the suspension, being initially not told of the date of the incident and not having been given copies of the relevant policies as having affected the overall fairness of the dismissal. He wrote:
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*“Dear Toni*

*Outcome of Appeal*

5 *Further to your appeal against the dismissal which took place in the presence of Jo Janikowski, area manager, your representative Lorraine Watson, and minute taker Sandra Brebner I am writing to advise you of my decision of the outcome of your appeal.*

10 *I fully considered the points you raise, and the facts surrounding your appeal and my findings are as follows:*

1) **You felt “kept in the dark”.....” Regarding the investigation process.**

15 *From my investigation I can find no evidence to suggest that you were kept in the dark. I can confirm that the investigation process was in line with company policy. It is not compulsory for an investigating officer to disclose information until they have received all the facts. An investigation process is a fact finding process. The reason for suspending staff following an allegation is to protect them from further allegation and to protect the vulnerable adults you work with.*

2) **“I was expected to defend myself during an investigation with minimal information”**

25 *The investigation process is to fact find and collect information regarding an allegation. You would not necessarily be provided with all the information until a decision has been made by the investigating officer to move to a disciplinary action. It would be at the disciplinary stage the employee would receive the relevant information related to the case. This is stated in your suspension letter.*

3) **It stated in your suspension letter that a copy of the disciplinary policy and procedure was enclosed.However you dispute this fact**

*I could not find any evidence to support this statement.*

35 4) **You stated that in your termination letter dated 31st October 2018 the specific date was given when the alleged incident took place 20th September 2018.**

40 *Reviewing this case I can confirm that you provided evidence that you were working elsewhere during that day. I can confirm that the incident was suggested to have happened between 1st August and 15th September and this was a clerical error.....”*

44. The claimant lost her registration with the SSSC when she was dismissed. It took until the 16 January 2019 for it to be restored. There is a shortage of staff in the care sector. There were a number of care homes in the Nairn area apart from the home run by the respondent. The claimant did not apply to these  
5 homes for work. She had in the meantime looked for alternative employment and stated work with Primark in Inverness on the 11 December. She was paid £7.31 per hour and contracted to work 22 hours per week from Monday to Friday (JBp183) This work involved the claimant in incurring travelling costs (train fares) of £9.40 per day from her home in Nairn a cost that she did not  
10 previously have. The claimant was paid £129 net on the 21 December and £840.75 on the 18 January. She was paid £818.54 on the 15 February.
45. The claimant is settled and happy in her work there. She is not looking to work in the care sector at present and has not agreed to work through Aberness  
15 Recruitment although such work would be available.

### Witnesses

46. I found the respondents witnesses to be generally credible and reliable although I found their reasoning at points difficult to follow. None of the  
20 witnesses seems to have thought through the problems with the evidence they had or sought to make further investigations (other than Mr Douglas checking the training records) Both Mr Douglas and Mr Janikowski seemed unprepared to contemplate no action being taken against the claimant although they acknowledged the obvious contradiction between the two  
25 statements made by Mr Bowles. Their answer was to take refuge in the thought that 'something must have happened'.
47. The claimant gave her evidence in a clear and measured way and I found her evidence to be both credible and reliable. She readily conceded that she had  
30 gone off the idea of making care work her career following this incident and was no longer looking to supplement her income from working in a shop though undertaking care work.

**Submissions**

48. Mr McFarlane began by reminding the Tribunal of the dangers in substituting its views for those of the employer as this seemed to be the argument being advanced by the claimant's solicitor namely that the Tribunal should form a different view of the evidence and sanction. No one could fail to have some sympathy with the claimant a young woman who had lost her job. Any issues that had arisen with the decision made by Mr Douglas had been cured by the full appeal which had been a full review of the earlier decision. In relation to any inconsistencies in the evidence the employers were entitled to resolve these through reasonable assumptions.
49. The Tribunal should hold that the respondent's witnesses, all of whom are experienced in the care sector, were credible and reliable in their testimony. In relation to mitigation of loss if the Tribunal found for the claimant future loss should be restricted. The claimant had volunteered in evidence that the experience of losing her job had disillusioned her with the care sector and that she had not applied for jobs for which she was experienced and which were available when her registration had been restored.
50. In response Mr Lefevre began by submitting that the investigation had been flawed at the outset and contradictions in the evidence of Mr Bowles had never been addressed. The respondent's reasonable grounds to come to the conclusion that the claimant had breached their policies. The way the disciplinary had been handled, despite apparently getting HR advice, had been a shambles.

**Discussion and Decision**

51. The key statutory provisions that the Tribunal applies are well-known.

**(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-**

5           **(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.**

10          **(2) A reason falls within this subsection if it-**

**(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,**

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

15          **(c) ....**

**(4) In any other case 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)-**

20           **(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**

25           **(b) shall be determined in accordance with equity and the substantial merits of the case."**

51. The Tribunal also had regard to the Judgment of Mr Justice Arnold in the case of *Burchell v British Home Stores* when he stated:

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

35           *employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the*

40           *matter as was reasonable in all the circumstances of the case. It is the*

*employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further”.*

The task for the Tribunal was summarised by Mummery LJ in **London Ambulance Service NHS Trust v Small** [2009] IRLR 563 at paragraph 3 where he said this:

*“The essential terms of inquiry for the ET were whether, in all the circumstances, the Trust carried out a reasonable investigation and, at the time of dismissal, genuinely believed on reasonable grounds that [the employee] was guilty of misconduct. If satisfied of the Trust’s fair conduct of the dismissal in those respects, the ET then had to decide whether the dismissal of [the employee] was a reasonable response to the misconduct.”*

52. In coming to a decision the Tribunal also had regard to the well known case of **Iceland Frozen Foods Ltd v Jones** [1983] ICR 17 which is authority for the proposition that the Tribunal should not substitute it’s views for those of the employer. The Tribunal also bore in mind that the band of reasonable also applied to other decisions made by the employer in the disciplinary process.

53. By virtue of section 98(4) the key question for the Tribunal was whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonable or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee. In the present case the employers are a relatively large company who have experienced managers, appropriate policies and access to professional advice.

54. Whilst recognising that it is easy to fall into what has been termed the substitution mindset the employer is not the final arbiter of its own conduct in dismissing an employee. It is for the Employment Tribunal make its own judgment always bearing in mind the above noted tests (**Bowater v North West London Hospitals Trust 2011 EWCA Civ 63**).



55. The first attack made by the claimant on the fairness of the dismissal related what could be described as the process adopted specifically the manner of her suspension and the repeated failure to send her copies of the relevant policies. While these latter lapses were unfortunate and left the Tribunal with the impression of a poorly carried out process they do not impact on the fairness of the procedure taken overall. The allegation the claimant faced was a simple straightforward one and she had the necessary policies before the disciplinary hearing and for some time before the appeal. There is no evidence of any real prejudice caused to her by the respondents lack of professionalism surprising as it was that Ms Crawford did not check the enclosures to her letters to the claimant and her allowing administrative staff to sign important letters on her behalf.
56. The suspension was justified in the circumstances given the seriousness of the allegation and the necessity of protecting vulnerable residents and I do not criticise Ms Crawford for contacting the claimant in advance of her shift to do this. This was clearly preferable to waiting until the claimant attended work and had to face the embarrassment of leaving early on suspension. She should have been in a position to advise the claimant, even in general terms, why she was being suspended but again no real prejudice arises.
57. Mr Douglas met the claimant and was able to assess her credibility as a witness and he candidly accepted that he was impressed with her evidence. It is perhaps unfortunate that he did not hear her evidence directly from Mr Bowles to make the same sort of assessment. He relied instead on the written statements that had been prepared and we will consider those at a later point.
58. Of considerably more concern was the fact that Mr Douglas was going to give the claimant a warning having decided that he found her denials convincing. There was some confusion in his reasoning that she should receive such a warning in the face of his having doubts about the evidence of Mr Bowles and her denial appearing convincing. As Mr Lefevre put it his mind was made up for him by Ms Crawford. I accept that Mr Douglas was put

in a difficult position in some ways. This may have been because he recognised that he was not her superior in the organisation or that he was prepared to defer to her views as, if the claimant was not dismissed, she would have had the task of monitoring the claimant's future behaviour. For whatever reason I was left with the strong impression that he only reluctantly acceded to her determined wish to dismiss the claimant.

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59. Mr McFarlane argued that the provision of an appeal cured these, and any other issues with the process but the matter is not as clear cut. While the provision of an appeal can resolve procedural difficulties depends often on the way in which the appeal is conducted and whether flaws in the earlier process were addressed.

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60. The difficulty Mr Janakowski faced was that the statements on which he relied were the same as those relied upon by Mr Douglas. He did not seek to hear the evidence first hand which would have allowed him to address the inconsistency in Ms Bowles position. It is not good enough to say that he this could be resolved by him making reasonable assumptions about what was meant or what had happened. What puts the matter beyond doubt is that no evidence was led from Mr Janikowski about the assumptions he made and the basis for them which could then be challenged. It was only suggested in submissions that the first statement was written in the way it was because Mr Bowles did not want to get the claimant into trouble.

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61. The employer was still left with the situation that we do not know accurately what he was in a position to see and what he actually saw rather than assumed. There was no explanation as to how he could have seen a manual evacuation take place when he was facing an agitated patient on a hoist when the claimant was both behind and below the resident. These are not abstract legal quibbles but essential issues that a reasonable employer, aware of the possibly devastating consequences both for the claimant's job and future registration with the SSSC, would have to address before coming to the conclusion that a manual evacuation took place.

62. In the circumstances of this case Mr Lefevre's submission is well founded that the enquiry made by the employer was inadequate and that they had insufficient evidence to allow them to form a reasonable belief in the claimant's guilt and accordingly the dismissal is unfair.

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63. The claimant's solicitor lodged a Schedule of loss which was unchallenged apart from the issue of future loss. The claimant was candid that she had decided on a change of career. She had dropped out of obtaining a qualification in care and had not chosen to boost her income at present doing care work for any agency. The employers are not required to pay for the claimant's choices. The claimant has an obligation to take reasonable steps to mitigate her loss and the future loss must accordingly be curtailed.

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64. The claimant received confirmation that the SSSC were not pursuing any action against her on the 16 January when her registration was restored. I think it would be reasonable to assume that it might take up a month to arrange interviews and apply for jobs to obtain full time work and or indeed to get agency work again. This cannot be an exact science but the future loss will be curtailed to one month's future loss from the 16 January when she became entitled again to practice in the care sector.

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65. The claimant is entitled to a basic award calculated with regard to her service of two years amounting to £775.38 (2x £387.69). The claimant is also entitled to a compensatory award. Her net monthly remuneration with the respondents was £334.48 after taking her net salary of £1384.64 and adding back pension contributions and Student Loan payments (£23.54 Employer's contribution, £28.25 employee's contribution and £13 Student Loan). The loss from the 1/11/19 to the 11/12/19 when the claimant stated work with Primark is £1672.40 (5 weeks x £334.48). From the 11 December to the 15 February is approximately ten weeks. The claimant would have earned £3344.80 (£334.48 x 10). She earned £1789.25 during this period with Primark (£129.96, £840.75, £818.54) (JBp186.187,188). The difference is £1555.55. However, the claimant also now required to travel to work and it is just and

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equitable to add to take account of these costs £376 (10 weeks x 4days x £9.40) making a total loss of £3603.95 (£1672.40+£1555.55+£376). The claimant shall be awarded £350 for loss of statutory rights bring her whole monetary award to £4729.33.

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Employment Judge:	Mr JR Hendry
Date of Judgment:	21 June 2019
Date sent to parties:	24 June 2019