



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Sorsby

Respondent: Fisherbell Ltd

HELD AT: Sheffield

ON: 20 and 21 June 2019

BEFORE: Employment Judge Trayler

REPRESENTATION:

Claimant: Mr P Starcevic, Counsel

Respondent: Miss C Elvin, Consultant

JUDGMENT having been sent to the parties on 3 July 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant, Mrs Sorsby, complains of unfair dismissal and of breach of contract for failing to pay notice pay. The issues for the tribunal to determine are whether the respondent can show the reason it dismissed Mrs Sorsby and, if so, whether that is a reason within section 98 of the Employment Rights Act 1996. The respondent says it dismissed Mrs Sorsby for reason of her conduct. If the respondent shows that is the reason for dismissal the tribunal has to determine whether the dismissal was unfair. In that regard the tribunal is to determine whether the respondent had an honestly held belief in the conduct of Mrs Sorsby and whether the process by which it dismissed her was reasonable. Mrs Sorsby says it is not reasonable because the respondent failed to interview relevant witnesses, that it obtained evidence from witnesses by duress and that the conduct the respondent relies upon does not amount to “abuse” as the respondent alleges. Mrs Sorsby also alleges that dismissal is not within a range of reasonable responses to the conduct alleged against her.

2. By an amendment to the claim other issues are set out in paragraph 10. By this Mrs Sorsby adds that the allegations against her had been exaggerated, that the conduct alleged against her were standard actions of a care provider, that no service user had complained against her, that she had never been told not to act in the way alleged, that the respondent had ignored her consistency in her account of events, that the respondent had failed to give consideration to the fact that it was the first disciplinary allegation against her, that it failed to give proper regard to other possible sanctions such as a warning, demotion or training, that it gave her no opportunity to show she could improve her conduct.
3. Within the hearing over two days the tribunal heard evidence from the witnesses for the Respondent Mr Saleem Hasan, his sister Ms Shireen Hasan each of whom are directors of the Respondent, a healthcare assistant Kerry Holmes and a further care assistant Lisa Allison. The tribunal also heard evidence from the Claimant Mrs Marilyn Sorsby. I read statements by Shabana Ali, Nicola Gray and Andrea Sorsby. I read documents paginated to page 184 as I was referred to them by the parties. I make findings of fact on the balance of probabilities.
4. The Claimant was born on 1 January 1946 and was employed by the respondent Fisherbell Limited from either 10 or 11 May 2004 until dismissal which is accepted and agreed by the parties to have taken place when Mrs Sorsby received a letter advising her that she had been dismissed by the respondent, namely 20 August 2018.
5. At the time of the dismissal Mrs Sorsby was employed by the Respondent as a laundry assistant and activities arranger. She had previously been a deputy manager. There had been no disciplinary or other matters formerly recorded against the Claimant. The respondent had previously expressed concerns to the claimant about her errors in the administration of medication. This is recorded in a letter to her of 18 June 2018, see page 45 of the bundle. On 4 July 2018 Mrs Sorsby agreed with her manager, Mr Cousins, that her duties were changed to laundry assistant/activities organiser with a reduction of working hours on set days of the week. There were exceptions to this for her to provide cover as assistant manager and in fact this is what seems to have happened since that change of role. An important to note is that the pay rate the Claimant previously had as assistant manager was maintained by the Respondent despite this reduction in responsibilities.
6. There is a written contract within the bundle. It includes within it an annotation recording agreement on 4 July as to the change in duties and working hours on which I heard evidence from the Respondent and the Claimant and I find the facts as I have recorded them in paragraph 5 above.
7. The Respondent had written procedures for dealing with disciplinary matters which include that disciplinary processes for persons of the Claimant's level could be dealt with by a manager (for example in this case Mr Cousins) and that disciplinary procedures for a manager, for example, to be dealt with by a director. However there is specific authority within the procedure to allow for example a director to deal with someone below manager level on disciplinary issues.
8. Within the disciplinary procedure is a "non-exhaustive" list of acts for which an employee would be liable to summary dismissal as gross misconduct. It is also stated that a breach of specific conditions, procedures and rules either within the staff handbook or otherwise made known to the employee would also result in the

disciplinary procedure being used to deal with such matters, see generally pages 39 to 41 of the bundle. A right of appeal against dismissal is provided in the process, the appeal is to be dealt with by a member of staff not previously connected with the process.

9. The Respondent has 46 employees and owns the residential home where the Claimant worked, White Rose Court. There are two directors Ms Shireen Hasan and Mr Saleem Hasan who are sister and brother. Mr Saleem Hasan also owns another company and is therefore responsible for the running of a care home called Darnell Court and other care facilities.
10. Within White Rose Court where the Claimant worked some workers were categorised as senior carers, some as care assistants and there was one manager, Mr Cousins. There were no administration or reception staff for example the Respondent was able to call upon staff from the other care home as note takers on at least two occasions during the course of with dealing with disciplinary allegations against Mrs Sorsby in this matter. The other care facilities run by Mr Hasan were owned by a separate company Hermes Care Limited also owned by Mr Hasan.
11. I accept the Respondent's evidence that it could not take staff from the caring operation to be involved within recording a disciplinary matter with Mrs Sorsby both because of operational needs and for reasons of confidentiality. However it is quite clear that the Respondent given its size and administrative resources could have separated the process so that a manager such as Mr Cousins, even after a short delay due to holidays, could have investigated, one of the directors conduct the disciplinary hearing and the other director the appeal. As an alternative in these three stages the respondent could have separated the processes completely so that for example Ms Hasan might have dealt with the investigation, Mr Cousins a disciplinary and Mr Saleem Hasan the appeal.
12. The Respondent as I have said is not large. It has 46 employees but was able to include two other people from Hermes Care Limited to assist disciplinary meetings as note takers and could have done so at other times also.
13. The issues concerning Mrs Sorsby with which this Tribunal is primarily concerned became apparent when there was a referral to the Care Quality Commission. This came to the notice of Mrs Sorsby's daughter, namely Andrea Sorsby, who informed the respondent. As a result Ms Hassan asked that both Andrea Sorsby and the Claimant write out statements which are within the bundles of documents at pages 52 to 59 and pages 60 and 61. In this Mrs Sorsby gives an account of how she had dealt with a resident who was disturbing other residents by taking him to an outer office. Miss Sorsby relates what she has heard about an allegation against her mother and a warning by Miss Homes that the claimant should, "Watch her back". Miss Sorsby also relates what she had heard about an allegation that her mother had pulled a resident's hair. Thereafter an investigation was conducted by Shireen Hasan. There is a dispute in this matter as to who conducted this investigation and most particularly who it was that dealt with an investigatory meeting direct with Mrs Sorsby herself. There are further disputes as to how far the investigation in reality was done by Ms Shireen Hasan rather than Mr Saleem Hasan.
14. My finding on this is that Shireen Hasan carried out the interviews with the Claimant and other witness although at times Mr Saleem was present either as a witness, as a note taker and in the case of the Claimant's investigation meeting on 7 August sat in with his sister and the Claimant.

15. There are many contra-indications within the notes as to how these meetings were carried out but the notes incorrectly state the venue of the meeting in one case, who is the manager and who is the note taker and indeed perhaps as the Respondent says there may well have been confusion by the person typing the notes who were unfamiliar with Mr Hasan being anything other than the manager. There is also the point that Mr and Ms Hasan each have the same initials.
16. The Respondent says there was a mistake within the typing and the typist really did not appreciate who was doing what and on balance I found that to be correct. There are within the bundle hand-written notes of discussions with various members of staff and a record of what they had each said. Those notes are at page 48 to 51 and pages 68 to 69 and in my finding were made by Ms Shireen Hasan. This at least provides some contemporaneous confirmation that Ms Hasan was carrying out an investigative role.
17. There follows a number of meetings and interviews with staff members. From her notes it can be seen that Ms Hasan spoke to Lisa Allison. It was alleged by Ms Allison that the claimant had left a resident alone in a room with a closed door. Mrs Sorsby accepted that she had left him there facing a table to restrict him and that he was agitated and shaking. Mrs Sorsby is noted to accept that this is not appropriate. She accepts leaving him there for five minutes with the door open. Ms Alison also alleges that Mrs Sorsby had inspected a resident's bruised hand whilst she was waiting to go to hospital. Mrs Sorsby accepts that she may have touched the hand and that the resident had withdrawn her hand. A further allegation is made that the claimant had pulled a resident's hair. This is noted as being made by Ms Allison and there are further comments that Mrs Sorsby had denied that same resident things such as food. Mrs Sorsby is noted to deny these allegations. A further note is made of allegations by two carers Kerry Holmes and Lisa Alison that the claimant had slapped a resident across the cheek when he was agitated and they were trying to lift him. Ms Allison alleges that he claimant also said to him that each time he shouted she was going to "crack him". Mrs Sorsby's version is noted to be that she had tapped the resident on the head but had not slapped him and when asked for how long she replied that this had been for two or three minutes to get his attention.
18. On 1 August Ms Hasan interviews Lisa Allison accompanied by Mr Hasan as note taker. The notes are at pages 62 to 63. In it Ms Allison is asked why she had not reported concerns direct to the respondent and why the events are not noted in the patients care plan. Ms Allison accepts that this should have happened. Ms Allison says that Mrs Sorsby had left a resident in a small room for twenty minutes before asking her to check on him. When she had gone into the room Ms Allison says that she found the resident quiet but that he could have fallen from his wheelchair which had been placed with the arms facing the table and the chair's brakes on.
19. On 2 August Ms Shabana Ali is interviewed, notes at page 64. Ms Ali recounts that she had been told by Kerry about a resident shouting but had pursued it no further. Ms Ali is asked if she had seen anything untoward and confirms that she had not. It transpires that Ms Ali was present whilst the resident was waiting to be taken to hospital and it is alleged Mrs Sorsby inappropriately examined her but no questions are put to her about that.
20. A resident is interviewed on 2 August and makes general comments about the claimant's attitude. This resident is not the one whom it is alleged the claimant hit and left alone, nor is it the resident whom it is said the claimant inappropriately examined, nor is it the resident whom it is alleged that the claimant had pulled her

hair. There is a page 2 of notes of discussions with Kerry Holmes on page 66 but nothing further seems to arise from that.

21. By letter of 2 August 2018 (page 46) it is confirmed to Mrs Sorsby that she has been suspended and that she is required to attend an investigative meeting on 7 August. The purpose of the meeting is said to be to seek her explanations for incidents reported to the Care Quality Commission (CQC).
22. A written statement by Katy Akers is in the bundle at pages 67. Ms Akers says she saw Mrs Sorsby slap the resident on his face and shouting "Stop shaking, what is wrong with you". Andrea Sorsby is alleged to say "Mum stop. What are you doing"? In what is said to be a later incident it is alleged that Mrs Sorsby said to the resident that each time he shouted she would crack him round the head. When the resident shouted Mrs Sorsby is noted to "hit him on his right hand side of his head".
23. Annette Rowling is interviewed by Ms Hasan with Mr Hasan present. The typed notes are at page 70. Ms Rowling confirms hearing about Mrs Sorsby pulling a resident's hair. Ms Rowling says she saw Mrs Sorsby hit a resident across the head two months previously. This latter allegation refers to the same resident as reported by Ms Akers.
24. Lisa Allison is interviewed by Ms Hasan with Mr Hasan present and the typed notes are at page 71. Ms Allison describes Mrs Sorsby lifting a resident's hand and pressing it with her other hand. Ms Allison reports the resident yelling and Mrs Sorsby saying the hand was not broken just bruised. At page 72 is a further note of interview with Ms Allison in which she alleges that Mrs Sorsby had pulled a resident's hair twice.
25. As above Ms Hasan made notes of the investigation which represent her thinking on matters and these appear within the bundle between pages 48 and 51. These at least corroborate that she had a role in this matter rather than Mr Hasan being the prime mover and I believe the evidence of Mr Hasan and Ms Hasan, Mr Hasan particularly being adamant that he would not seek to displace his sister who was better placed to carry out this investigation as she had previously been the registered manager of the home. In my finding the investigation was principally carried out by Shireen Hasan rather than Saleem Hasan. However Mr Hasan who sat in with her and in particular sat in with a n interview with Mrs Sorsby on 7 August for about five to 10 minutes.
26. I considered this on the evidence of the Claimant and the two witnesses for the Respondent and on balance I would have to find that Mr and Ms Hasan were lying about who had conducted that meeting because they were both very adamant about it and the recording of it whilst whereas I believe that in fact the Claimant is mistaken about this given the time which has passed by. I do not believe that the Respondent deliberately lied but I do believe the Claimant incorrectly recalls it.
27. On 7 August Mrs Sorsby is interviewed by Ms Hasan. The notes are pages 73 to 74. It is incorrectly stated that the meeting took place at White Rose Court, it in fact took place at Darnell Grange. It is stated that Mr Hasan conducted it as director which I also find incorrect and the note taker is Lynne Blyth. Mr Hasan was there for at least part of the time. It is stated that statements were read to Mrs Sorsby who denies leaving the resident alone save for going to make him coffee. Mrs Sorsby denies slapping the resident but she admits "tapping" the side of his head above his ear. Mrs Sorsby admits picking up the resident's hand and saying to Ms Ali that she should look at the bruising. Mrs Sorsby denies touching the bruised had and also denies pulling a resident's hair

28. A letter is sent to the Claimant requiring her to attend a disciplinary meeting on 14 August. There are four allegations within the letter which is at page 75 to 76 of the bundle. It is alleged that Mrs Sorsby had failed to comply with care standards procedures in respect of the care and dignity of service users/residents by on 26 July 2018 slapping a service user against the side of the head above the ear. I summarise this as “the slapping allegation”. Secondly (also said to be a failure to follow procedures for the dignity and well being of residents/service users) leaving a service user alone in an isolated room. I will refer to this as “the isolation allegation”. Thirdly it is alleged that the claimant had prodded the bruise of a service user (“the prodding allegation”) and fourthly that she had pulled the hair of a service user (“the hair pulling allegation”). Each allegation is said, if substantiated, to be regarded as gross misconduct and would, if no satisfactory explanation is given, mean that her employment would be terminated. Copy statements and disciplinary procedures are enclosed with the letter together with the notes of the meeting of “7 July”, in fact 7 August. Mrs Sorsby’s right to be accompanied at the meeting is pointed out.
29. The Respondent sent to the Claimant the statements gathered but as the Claimant submits it is difficult without explanation to know what each document is, who is being interviewed and what is being asked and what answers they gave. They do not set out in a clear way the discussions which took place. Nor do they amount to a statement written, approved and signed by each person interviewed as a summary of what had been said.
30. In effect there is no real challenge by the respondent of one person’s evidence against the other in particular in relation to the prodding allegation. Also full details of what is said by each person interviewed is not put to the claimant in respect of the tapping or slapping incident or incidents. Ultimately the allegations are quite clearly in my finding put to the Claimant so she can understand however what is being alleged against her and what issue the Respondent takes with her in the meeting of 14 August. The written evidence however is less clear. Neither is it clear that there has been any challenge of one’s piece of evidence against the other.
31. Both parties accept that in the meeting on 14 August Mr Hasan went through the statements with Mrs Sorsby and I find that Mrs Sorsby was given an opportunity to explain her part and her position on this and that this was noted and taken into account by Mr Hasan. The Claimant complains that within the meeting the Respondent simply jumps on the things that she has admitted and turns them into findings against her. That is one way of looking at it but another way of looking at it is that the Respondent having put the allegations to the Claimant took her version of events as a minimum acceptance that something untoward had been done and that this goes some way at least towards an admission. For example in relation to the slapping allegation the resident she denies this but accepts tapping him on the head over a period of two to three minutes. Mrs Sorsby accepts that this was possibly on two occasions to get his attention to have him calm down. That in essence is an acceptance of physical contact with the resident but a denial of slapping which is alleged against her as being one slap on the face albeit not being a very hard slap. Again the Claimant denies leaving the resident in the room unguarded for a longer period than five minutes but accepted in her terms “wedging” the resident in his wheelchair against the table by which his movement was restricted and leaving him unattended at a time when he had been very distressed and shouting and, at the very best, had started to calm down a little bit. The Claimant denies pulling a resident’s hair and no finding is made against her on this. Mrs Sorsby accepts moving

a patient's hand to show bruising and to pass her hand across it although she denies as alleged by the Respondent touching the bruising.

32. The conclusions reached by Mr Hasan after the meeting are set out in a letter of 17 August. The Claimant gave evidence that she received and saw that letter on the following Monday, 20 August and the parties accept that as the effective date of termination. The letter is at pages 80 and 81 of the bundle and within that document can be seen that the three matters of concern found against Mrs Sorsby are set out. The first is in relation to failing to comply with company rules and procedures in relation of care and dignity of a service user the allegation having been that she had slapped a service user. The allegation that this caused injury to a service user as witnessed by two colleagues and that the physical and mental discomfort amounts to assault. In the disciplinary meeting it is noted the Claimant accepted tapping the service user repeatedly on the head for a duration of up to three minutes which again is viewed as abuse and a gross breach of trust and it is this tapping which is found against Mrs Sorsby.
33. The second part similarly said to be against the procedures of the company is that the company had alleged that leaving the service user alone and in the hearing the Claimant had admitted that she restrained the resident by wedging the wheelchair against a dining room table leaving him facing a blank wall whilst he was physically shaking and distraught. It is noted that she accepted that she had left him there for five minutes which the company reviews as a gross breach of trust and comes under the respondent's abuse policy.
34. Again the third allegation upheld is in relation to the touching of the service user and it is said that the Claimant admitted that she carried out a non-necessary investigation on a heavily bruised hand whilst the employer was waiting to visit hospital for what is said to be a C Ray (but possibly an X-ray) and that the company felt that was proven as the claimant had admitted that the service recoiled her hand after contact by Mrs Sorsby. Again this is considered to be abuse as it caused the resident pain.
35. The Claimant is dismissed without notice and it is said that the conduct had resulted in a fundamental breach of contractual terms which irrevocably destroyed the trust and confidence necessary to continue the employment relationship. It continues that the appropriate sanction is summary dismissal and that reference has been made to the disciplinary procedure.
36. Dismissal is notified as being with immediate effect and that Mrs Sorsby is not entitled to notice pay.
37. A right of appeal is pointed out and that it is to a Mr Peter Rowley head of service within five working days of receiving the letter. The Claimant makes no appeal against the dismissal.
38. I have considered the evidence which the Respondent had for finding these allegations. The Respondent had evidence that the Claimant had slapped the resident and her own admission that she had tapped him on the head over a period of two to three minutes. As far as Mr Hasan or Ms Hasan are concerned they thought that was inappropriate and indeed Ms Akers who had written a statement and Kerry Holmes who gave evidence in the tribunal and also provided some written input were of a similar view.
39. It is hard to see objectively as to how one could justify slapping a resident once or indeed tapping him on the head at least twice over a period of two to three minutes

could be justified or be described as acceptable care. Mr and Ms Hasan thought not and were of the firm opinion that this was abuse. Objectively viewed it could be seen that this breach is the policies of the Respondent particularly that at page 168. Whilst the list of gross misconduct is stated not to be exclusive physical assault on a resident with dementia by tapping him as admitted by Mrs Sorsby is an action which goes to the root of caring for vulnerable adults in a sector which is justifiably heavily regulated could objectively be seen as a serious matter. The Respondent did that and I find that they were objectively justified in doing so.

40. Similar so far as leaving the resident alone is concerned much had been made during the course of the hearing as to the nature of where this gentleman was left. However, it was a room which was small in dimensions, was unfamiliar to him, was overcrowded by furniture and effectively provided no stimulation for him. In addition the door, as I find it, was closed as the Respondent found and again based on what the Claimant had said she may well have been trying to justify the positioning of the resident on the basis that he was thereby safe from falling from his wheelchair by wedging him in to the table. There is more to it than that in my finding. This was a resident who was causing disturbance to other residents by shouting and that causing them some chagrin as they were watching the television and again it is as the Respondent says it very much comes with the territory as to the behaviour that might happen within the home.
41. The Claimant however on any finding here as the Respondent considered had walked the resident through a room which was quite capable of housing him at least in the short term, a room which was familiar to him, had space and where he could easily be seen. The Claimant walked through that. Again the bedroom of the resident was on the ground floor and she could have taken him there.
42. It was not clear to the respondent (nor was it to me) as to why it was necessary to shut this resident in a small room rather than for example to continue to try to calm him down whilst somebody else went to get him a drink or a cake as the Claimant subsequently said that she did.
43. It is a serious matter as it represents a serious failure in care for a vulnerable person and the Respondent viewed it that way. Objectively, it seems that that is justifiable because of the respondent's duty to provide safe and appropriate care for vulnerable residents and service users.
44. On the prodding incident it is less clear and another carer present Shabana Ali in a statement to the Tribunal says that there was no touching but only an enquiry about the resident's hand. The allegation here was that by another carer, Ms Allison who gave evidence in the tribunal that the Claimant put her fingers onto the bruised area and then the resident was seen to pull her hand away. The Claimant accepts that she moved the hand in order to put it away from the side of the wheelchair but says that she simply passed her hand over the resident's hand without actually touching it.
45. Within the investigations matter Shabana Ali is not specifically asked a question about this but is simply recorded that she said she saw nothing untoward. I accept this and believe that the claimant submits that some further investigation would have been justified here to put specific allegations to Shabana Ali and to have her express comments upon it.
46. I take the view however that as Ms Allison says that the Claimant said that the person cared for said "ouch" and pulled their hand away, that the Claimant accepted could

not see the resident's face and could not therefore tell whether it was hurting her or not.

47. This touching was unnecessary, as the Respondent found, as the resident was waiting for an ambulance to go to hospital and it was unnecessary attention even though she was found to have two fractured fingers and a fractured part of her hand. It was unnecessary contact as the Respondent found.
48. On balance I preferred the evidence of Lisa Allison in this respect as did the Respondent and find as they did that there was touching which was unnecessary.
49. I find that the Respondent did dismiss the Claimant for the reasons that it gives. This relates to the conduct of the Claimant in my judgment. It goes beyond carelessness or negligent failings and as the Respondent submits is deliberate conduct which at least in the case of the slapping incident breached the Respondent's code on the care of adults and treatment by tapping or slapping is unacceptable on an objective basis and this cannot be seen as an error or mistaken step. Similarly tapping a resident on the head which is the lower end of that allegation accepted by the Claimant and found by the Respondent is hard to objectively justify in relation to a person who is in distress and has dementia in any sense at all. The Respondent rejected it as being reasonable and it is a deliberate action which is outside a range of reasonableness and any objective assessment. Again, leaving a resident alone as the Claimant accepts for five minutes when it was unnecessary was found by the respondent to be misconduct which was serious. I have already recited the reasons to why that was unnecessary. Again the touching was unnecessary. There is less clear evidence that this was deliberately abusive but was more in the range of misjudgement by the Claimant.
50. Of the three reasons which I find to be the reasons for dismissal, the tapping and the leaving of the resident alone, relate to the conduct of the Claimant. The Respondent has shown the three reasons for the dismissal and the principal reason being for reason of conduct, a reason within section 98 Employment Rights Act 1996, it is therefore a potentially fair dismissal.
51. I now apply a neutral and objective test set by section 98(4) of the 1996 Employment Rights Act and ask whether the Respondent acted reasonably or unreasonably in treating it as a sufficient reason to dismiss the Claimant. I find that the Respondent did not act reasonably. As I have already recited, I considered and find the reasons for the dismissal of those given by the Respondent.
52. I ask first of all whether it would be in within a range of reasonable responses for a reasonable employer to dismiss for those reasons in these circumstances. I find that there was no evidence of duress of witnesses. The allegations have not in my finding been exaggerated, quite the contrary in that the respondent essentially relies upon admissions by the claimant.
53. I find that objectively a reasonable employer operating a care home could dismiss for these reasons because it relates to the safety and the proper care of vulnerable people and essentially the human rights of those people to have a safe and caring environment.
54. Dismissal for reason of assault on the resident by tapping him and by leaving him unattended I find to be within a range of reasonable responses open to a reasonable employer as in *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 EAT. The assault

on the male resident even as the respondent found it as tapping is not outside a range of reasonableness.

55. The care standards in the home need to be met. The Respondent is governed by the CQC, the safeguarding department of the local authority and also, as here, potentially by a police investigation but the overall importance is the rights of the residents who are unable to provide care for themselves.
56. I disagree with the Claimant's submissions that it is outside the range of reasonableness. The Claimant had training in care. The Claimant accepted that she was fully trained. The claimant had received a recent module in training relating to dealing with challenging behaviour. Although the Claimant has 14 years' experience as a carer without previous disciplinary action that experience is essentially a two-edged sword. In some cases it might mean that minor transgressions could or should be overlooked and it would be outside a range of responses not to ignore them or at least to meet them with a lesser sanction than dismissal. On the other hand experience and long-service should have, as the Respondent said, told the Claimant that she should not have acted in that way both in relation to the tapping of the resident and in the leaving the resident alone. I find that it is reasonable to dismiss rather than to give further opportunities for successful or failed care by Mrs Sorsby given the serious failings on her part.
57. I have already recited the Respondent had loss of confidence in the role as deputy manager previously as can be evidenced by the Claimant being moved away from responsibility for drug administration within the home.
58. There is evidence within the bundle of this being raised in assessments with the Claimant and that she had been offered training from the Care Commissioning Group as well as being referred to Boots online training previously. It was a proportionate response at that time to change duties and hours and it does not lead me to believe that the Respondent had it in for the Claimant. To the contrary it says to me that Mr Hasan was prepared to treat this matter with an open mind without consideration of, or being pointed in a particular way, by what had happened before.
59. I am to apply the tests in *British Home Store Ltd v Burchell* [1978] IRLR 379 EAT. I find that the respondent did have an honestly held belief in the findings against Mrs Sorsby. There were reasonable grounds for that belief but the respondent had not carried out such investigation as was reasonable as explained below.
60. I turn now to the investigation which I find is not within a range of reasonableness. I would expect and I think the Respondent accepted during the hearing that they should make at least better records of the interviews that take place and that a detailed account is made of the information which is given by those who are interviewed and that this is disclosed to the employee accused. Also, questions put and answers given in relation to each person interviewed should be recorded and that some challenge is made of evidence between those of one person and another. In particular in relation to the case of *Shabina Ali* there is a deficiency in failing to interview her directly and to put specifically what had been alleged against the Claimant.
61. Again I would expect an employer of this size to act reasonably by gathering that information and to put it into a format where it could be reviewed afresh and objectively by an officer within the company not involved in the investigation at the disciplinary hearing. This is what the Acas Code requires wherever possible. I have already explained as to why that is a possibility here because there are sufficient

people of standing in order to do it between the manager, the two directors and potentially Mr Rowley.

62. The Respondent as the Claimant submits needed to have a careful consideration of the evidence in the matter when there is a serious allegation which potentially could be a criminal offence or which has an impact on a person continuing in their chosen career. It should be careful both to consider evidence which as it says exculpates as well as inculpates the employee. The overriding test is to see whether the investigation is within a range of reasonableness as explained in *Sainsbury's Supermarket v Hitt* [2003] IRLR 23 CA and as the Claimant submits this has to be against the background of the allegations themselves and the weight of those of the decision on the employee see *A v B* [2003] IRLR 465 EAT.
63. The Respondent could have challenged the Claimant, as submitted on her behalf, as to whether she did in fact carry out tapping on the resident's head for two to three minutes because that is a long time, but the Claimant says that she did in fact say that and on that basis I have judged the Respondent's conclusions. Again it could have given more consideration and put the direct case that Mrs Sorsby had wrongly touched the resident to Shabina Ali for her input and could have explored in more detail the two different allegations of hitting as opposed to slapping the resident.
64. So far as leaving the resident alone is concerned the Claimant's version is serious enough in my view and the Respondent having at least made its minimum finding in that respect of leaving him for five minutes there is little more that could have been investigated. There is an attempt to take into account all versions and, as I have already recounted, the Claimant could have avoided leaving the resident there for the time that she did.
65. By the time of the disciplinary hearing Mr Hasan does go through the allegations with the Claimant and substantially finds on the basis of the Claimant's admissions.
66. On balance I think that the investigation could have been better organised, could have been split between different officers and there could have been more information gathered together in writing than disclosed to the Claimant in advance of the hearing and the detailed evidence could have been challenged.
67. On that basis I find that the Respondent did not acted reasonably in treating it as a sufficient reason for dismissing the Claimant. So far as any appeal was concerned, Mr Rowley was not essentially in a position of seniority in comparison to Mr Hasan. Although Mr Rowley was responsible for conducting audits and therefore potentially challenging the conduct of the Respondent within its business, it is hard to see how he could have a particular ability to be objective and to overturn his employer's decision when he was an employee of Mr Hasan.
68. Having found that dismissal to be unfair only on those bases I have to determine the issues as to what remedy should be ordered in favour of the Claimant. As invited by the parties I deal initially with compensation and return to other remedies later. I believe that the Claimant did contribute to her dismissal by her conduct which was culpable and blameworthy in relation to the tapping of the resident and also the leaving of the resident within the confined space.
69. Having heard the evidence in this case from the Claimant and from Lisa Allison as well as the notes of what has been recorded my finding is that separate to that of the Respondent that the Claimant did slap the resident, that she sought to pass that off as tapping him which again is equally culpable and blameworthy and was my finding,

and the Claimant accepted that she may well have said that she did this over a period of two to three minutes. It is serious, it is an assault on a vulnerable person and as I have already recounted it is hard to understand how this could have assisted the situation which was presented by the resident on that day. I preferred the evidence of the witnesses who were present rather than that of Miss Sorsby who did not attend. Miss Holmes and Miss Alison were properly and thoroughly cross-examined by Mr Starcevic on behalf of the claimant and substantially held to their versions of events.

70. As far as this hearing is concerned I heard the evidence of Kerry Holmes and Lisa Allison as well as the evidence of Mr and Ms Hasan and find that if a fair procedure had been operated the same conclusions would have been reached in relation to isolating and assault although it is less clear on the touching allegation. I do not think that a fair process would have taken any longer than that which was conducted and on those bases both in relation to those two acts that they are culpable and blameworthy and contribute to the dismissal by the Respondent and it is therefore just and equitable to eliminate the basic award that would have been ordered in this case by section 112 (2) Employment Rights Act 1996 as it is just and equitable to do so. I also eliminate any financial compensation that would be ordered under section 123.
71. There is an additional point within this that it is not just and equitable to compensate because had a fair procedure been operated in the way I have outlined here, in other words and in essence and in accordance with the ACAS code of conduct and by providing an independent person who had the ability or the ostensible power to overturn a dismissal the same result would have been dismissal and therefore in accordance with principles in Polkey and A E Dayton Services Ltd [1987] IRLR 503 HL that the dismissal would have occurred in any event.
72. So far as the breach of contract complaint is concerned on a similar basis the two acts of slapping and tapping the resident and isolating the resident in my finding have broken the contract of employment. The list of gross misconduct in the contract is not exhaustive but the claimant clearly failed to comply with the Respondent's policies particularly in relation to the slapping/tapping allegation and the policy at page 168. It is serious, it is a breach of contract by the Claimant and the Respondent as a result is therefore entitled to terminate the contract without giving notice. Mrs Sorsby was employed to provide safe and appropriate care for vulnerable service users. Instead, Mrs Sorsby had failed by assault in one case and by isolation in another. The respondent did not trust her to carry out safe care in future and in my finding are justified in that.
73. When a tribunal makes a finding of unfair dismissal it shall explain to the claimant the remedies of reinstatement and reengagement, section 112(2) of the 1996 Act. A tribunal has a discretion to order reinstatement or reengagement (section 113). In exercising that discretion the tribunal shall take into account whether the claimant seeks either of those remedies, whether it is practicable to order it, and where the employee has contributed to the some extent to the dismissal whether it would be just and equitable to order it. These conditions apply to either reinstatement or reengagement, see sections 115 and 116. For these purposes "practicable" means not only merely possible but whether it is "capable of being carried into effect with success", Coleman and Stephens v Magnet Joinery Ltd [1974] IRLR 343 CA. An order for re-engagement should not be made where the degree of contribution by the employee to the dismissal is such that no reasonable tribunal could consider the order appropriate, Nairne v Highlands and Islands Fire Brigade [1989] 366 CS.

74. I informed Mrs Sorsby of the requirement in law that I have to explain to her the remedies for unfair dismissal which are to be dealt with in order. Firstly reinstatement, secondly reengagement and thereafter compensation. I had already explained my findings in relation to compensation. After explanation and the chance to take advice Mrs Sorsby said that she wanted to seek reinstatement and reengagement. No further submission was made in support of this save that Mrs Sorsby wanted her job back. I asked the Respondent whether their submission is, in the light of the findings and the decision that they had made, that the reemployment of Mrs Sorsby would not be a step they wish to consider and that was confirmed to be the case.
75. I sought to explain the remedies as I legally must in relation to reinstatement and reengagement. However, the findings that I have made here are that the Respondent first of all had fairly taken the decision to dismiss and that dismissal is within a range of reasonableness at least in relation to the two allegations of slapping/tapping and isolating the resident. The findings as I have already explained are serious and culpable and blameworthy and they would not make any difference in my view whether the Claimant was to work for Fisherbell Limited at one home or, even if it was shown that there was a sufficiently associated, in the other home if she were reengaged elsewhere. The tasks the Respondent has is in relation to caring for vulnerable adults. The Respondent found the Claimant lacking in that respect. Whilst I have found against them on the procedural fairness I have found that it was within a range of reasonable responses to dismiss and further that there has been culpable and blameworthy conduct by the Claimant. In those circumstances I did not believe that reinstatement or reengagement could be carried into effect with success. Objectively I find that it would not be reasonable to impose this upon the respondent given the risks as to the care for vulnerable residents if I were to order it. No order is therefore made for reinstatement or reengagement. It could not be carried into effect with success and the claimant's contribution to dismissal by her conduct means it is not reasonable to order it.
76. I find that it would not be just and equitable to exercise a discretion in favour of reinstatement or reengagement here where there has been a serious breach of the employment relationship in the way I have already recited in some detail to the parties and therefore I would make no order for reinstatement or reengagement. The conduct of the claimant touches and concerns the safe and proper care of vulnerable adults and it is not just and equitable to expect the respondent to take a further risk in employing the claimant given my findings as to Mrs Sorsby's conduct.

Employment Judge Trayler

Date: 25 July 2019

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