EMPLOYMENT TRIBUNALS

Claimant: Mrs J Austin

Respondent: Anchor Hanover Group

HELD AT: Manchester **ON:** 15 October 2019 and 7 February 2020

BEFORE: Employment Judge Phil Allen (sitting alone)

REPRESENTATION:

Claimant: Miss J Hughes, Counsel
Respondent: Mr G Price, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant was unfairly dismissed by the respondent and her claim for unfair dismissal is well founded.

2. An adjustment of 20% should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed (*Polkey*).

REASONS

Introduction

1. The claimant was employed by the respondent as a Team Leader from September 2013 until 6 March 2019. The claimant was dismissed by the respondent. The respondent contended that the reason was fair, being gross misconduct, and that the dismissal was fair. The claimant alleged that the dismissal was unfair.

Claims and Issues

2. The issues in the claim were as follows:

    a. Why was the claimant dismissed? The respondent says that the reason was gross misconduct.
    b. Did the respondent believe in the guilt of the claimant?
    c. Did the respondent have in its mind reasonable grounds upon which to sustain that belief?
    d. Did the respondent carry out as much investigation into the matter as was reasonable in all the circumstances of the case?
    e. Was the decision to dismiss fair? Did the decision to dismiss fall within the band of reasonable responses of a reasonable employer?
    f. Would the claimant have been dismissed anyway if a fair procedure had been followed? If so, to what extent and/or when? (**Polkey**)

Procedure, documents and evidence heard

3. The claimant was represented throughout by Miss Hughes, Counsel. The respondent was represented by Mr Price, Counsel.

4. The Tribunal heard evidence from: the claimant; Ms L Millard, the Registered Manager of the relevant care home operated by the respondent; and Ms S Croucher the Regional Support Manager for the respondent's northern region. Each witness had prepared a witness statement which was read by the Tribunal and each witness was cross examined.

5. The Tribunal was also provided with a bundle of document which ultimately ran to 224 pages. The Tribunal read only the documents to which it was referred in witness statements or in the course of the hearing.

6. During the hearing, various documents were identified which had not been previously been disclosed and which had not been included in the bundle of documents. These included: the daily records of one of the relevant residents; a letter sent by the disclosure and barring service; a form completed by Ms Croucher which was sent to Manchester City Council about an incident raised in the disciplinary process; and a timeline prepared by Ms Croucher. All of these documents were added to the bundle and considered as part of the evidence.

7. On the second day of hearing, Ms Croucher made reference in her evidence to historic issues relating to the claimant and documents which she believed evidenced these matters. As a result, a longer lunch break was taken to enable such documents to be obtained and to enable the respondent to ensure that all documents relevant to the issues in the claim had been disclosed and provided to the Tribunal. A number of documents were subsequently provided to the Tribunal, but as these were not relied upon by the respondent or introduced as evidence, they were not read by the Tribunal, paginated or added to the bundle. The Tribunal has not taken into account Ms Croucher's assertion about historic issues involving the claimant as it has not been taken to any document which supported that assertion.

8. Whilst there were questions about whether the respondent had complied with its obligation to disclose all documents which were relevant to the issues in the claim and how thoroughly it had tried to identify relevant documents, the case was able to be heard and to conclude on the basis of the documents to which the Tribunal was referred.

9. The parties each made submissions, relying upon a written skeleton argument supplemented by oral submissions. At the end of submissions (and as it was 4.45pm), the Tribunal reserved judgment and accordingly provides the judgment and reasons outlined below.

Facts

10. The respondent is a trusted provider of residential care for elderly people and offers specialised dementia care services for elderly residents who have difficulties associated with old age.

11. The claimant was employed by the respondent from September 2013. She worked in a care home operated by the respondent. She had many years of experience of working in a care environment. At the relevant time she was a Team leader.

12. In the course of the respondent's internal disciplinary procedures involving the claimant, the respondent (quite appropriately) anonymised the allegations made so that the names of residents were not used in the documentation. The first initial only was used in the respondent's internal documentation. Unfortunately, both of the residents potentially involved had the same first initial. This resulted in there being some difficulty in identifying which resident or residents was/were involved in the allegations. For the purposes of this judgment the Tribunal will refer to the two relevant residents as X and Y. This is intended to provide greater clarity than was provided by the initial used by the respondent and avoid the confusion which existed within the respondent's internal procedures (whilst protecting the anonymity of the residents).

13. The respondent's case was that the claimant was dismissed for her treatment of resident X. The claimant's case was that she always understood that the allegations related to resident Y.

Alleged misconduct

14. Allegations against the claimant arose from alleged incidents which occurred during a shift on 10 January 2019. In summary the complaints were that the claimant had displayed inappropriate behaviour towards a resident by: shouting at him and drag lifting him from his chair; shouting left right left right at the resident to make him walk; grabbing his ear whilst sitting him in a chair; and referring to the resident as stupid. These allegations were initially raised by Ms Rothwell. She was another Team Leader who had been with the respondent a very short length of time and was still within her probationary period. As detailed below, it is not entirely clear whether the alleged incidents

involved resident X or resident Y, or whether some allegations related to one and others the other.

15. Complaints were also made about the claimant's conduct towards her colleagues. These related to a longer period of time than the allegations in relation to the resident(s). One of the allegations was that the claimant was rude towards Ms Rothwell as part of a conversation with her about a resident. This was alleged to involve Ms Rothwell being told by the claimant not to empty a full pad being worn by the resident while he was restricted to his bed on 11 January 2019. The resident involved was referred to using the same initial as the one involved in the allegations of 10 January. It was agreed by both parties that the resident in question on the 11 January was resident X.

16. On 12 January the claimant had a disagreement with Ms Rothwell about the rota, and the floor on which Ms Rothwell should be working (and with whom). It was the claimant's evidence that Ms Rothwell was friends with another of the care staff and wished to work with her. It was the claimant's case that this disagreement led to Ms Rothwell and her friend raising the complaints about the claimant (which had not been raised previously and were not raised on the dates they allegedly occurred).

Investigation

17. On 14 January 2019 Ms Rothwell made a complaint about the claimant. This was investigated. As part of the investigation, statements were taken from a number of individuals, including Ms Rothwell. Her statement refers to the relevant resident by a single initial. Within the statement she makes no distinction between residents when relating the events referred to - suggesting that the allegations were all related to the same resident.

18. On 16 January 2019 the claimant was suspended pending an investigation. On the 22 or 23 January the claimant was interviewed by the investigator about the matters which had been raised. The claimant was read Ms Rothwell's statement and the other statements which had been obtained. She denied almost all the allegations. She was asked why Ms Rothwell would lie and gave an explanation – challenging Ms Rothwell's credibility and highlighting that Ms Rothwell had only been employed by the respondent for six weeks. She contended that most of what was said was a lie, but explained that the left right comments were something she normally did say to a resident with Parkinson's disease to help them when walking. Of the relevant residents, resident Y has Parkinson's, resident X does not. In her evidence to the Tribunal, the claimant's evidence was that in the investigation meeting she referred to the resident by his actual name and not by his initial – using the name of resident Y. As the Tribunal has only heard from the claimant about this meeting, the Tribunal finds her account of it to be true and accurate.

19. A report was produced by the investigator dated 6 February which appended notes of the interviews undertaken. The Tribunal did not hear evidence from the investigator. He does not appear to have revisited the allegations with any of the witnesses following his conversation with the claimant. His conclusion was that there was evidence to support the specific allegations set out and he

recommended that the case proceed to a disciplinary hearing. He confirmed that the allegations may constitute gross misconduct. The investigation report is somewhat limited. The investigator does not appear to have made any attempt to obtain residents' notes or records, which were likely to have provided some evidence about what had occurred and when, in an environment where thorough records are maintained about residents and their care. He appears to have made no attempt to investigate the account provided by the claimant about Parkinson's, nor has he established whether the resident about whom the allegations were made had Parkinson's. On the respondent's case, this was something which he could have identified as resident X did not have Parkinson's (which would have suggested that when spoken to about the allegations, the claimant had been relating events involving a different resident).

Disciplinary hearing

20. On 13 February 2019 the claimant was invited to a disciplinary hearing by Ms Millard. The invite letter set out two allegations, with the second allegation broken down into four sub-allegations. The first allegation was that on multiple occasions the claimant had breached the respondent's values and behaviours, by shouting at, verbally belittling and humiliating colleagues. The second allegation was that the claimant had displayed inappropriate behaviour towards the resident (identified only by his initial). All of the allegations in the second category were listed as occurring on 10 January and did not include any allegation about the treatment of a resident on 11 January. The second allegation's sub-allegations were particularised as detailed at paragraph 14 above.

21. The disciplinary hearing took place on 26 February 2019. It was chaired by Ms Millard. An employee attended to take minutes. The claimant was accompanied by her trade union representative. At the start of the meeting Ms Millard initially questioned the trade union representative's proposed attendance and involvement, and adjourned to speak to her HR advisor to establish whether the representative was allowed to attend and to outline the claimant's case. After returning to the meeting Ms Millard did allow him to do so.

22. In her evidence to the Tribunal, Ms Millard explained that she believed, while she was conducting the hearing, that the allegations related to resident Y. The respondent's case before the Tribunal was that in fact the allegations related to resident X. The claimant's evidence was that she referred to resident Y by name. The claimant provided her explanation for using the words left and right with reference to a resident with Parkinson's, who could only be resident Y (of the two in question).

23. In explaining her response to the allegation relating to conduct towards her colleagues (which the claimant denied) the claimant addressed the account given about resident X and 11 January. The claimant explained that she did not and would not have left a resident in that condition, and in any event would not have done so on this occasion because the doctor was coming in to

see the resident. The claimant's evidence to the Tribunal was that this related to resident X and that she used his name in the hearing.

24. At the end of the disciplinary hearing the claimant's representative read through some lengthy notes which he had prepared, addressing the case against the claimant. The notetaker did not record what was said, save for recording a few brief points. One of the points recorded by her is the argument that one of the witnesses was contended to not be credible. The Tribunal was provided with a copy of the notes from which the representative read. Those notes were difficult to read. It is however clear that his contention was that Ms Rothwell had made the allegations up. With regard to the allegation about grabbing a resident by the ear, the representative argued that had it happened it was so serious as to be an act of assault. His argument was that if anyone had ever witnessed such an event, they should have reported it to the police (which had not occurred, the issue only being raised internally a few days later).

25. Ms Millard did not arrange to hear herself from any of the other witnesses (including Ms Rothwell), she relied solely upon the statements appended to the investigation report. Even when it became clear that some of the allegations could only be determined by deciding whose evidence she preferred when considering the claimant's word against that of another employee, Ms Millard took no further steps to establish for herself the accuracy or credibility of what had been said to the investigator. She did not hear from Ms Rothwell or test her/their statements, and she did not provide the claimant with any opportunity to challenge Ms Rothwell or other witnesses about what had been said.

26. The notes record Ms Millard as referring to an inappropriate tone running through all of the statements, and the rude and aggressive manner in which she said the claimant seemed to be speaking to people. The words used by Ms Millard in the meeting clearly suggest that she had already determined that the claimant was guilty of the allegations before hearing from the claimant.

27. Having heard from Ms Millard, the Tribunal finds that she had pre-determined that the claimant was guilty of the allegations made, before she heard what the claimant had to say in the disciplinary hearing, evidenced by: the questions asked by her in the disciplinary hearing; the absence of any real testing of the evidence; the fact that she did not hear from the employees who made statements, but concluded that on balance she preferred their accounts; and her evidence to the Tribunal.

28. The disciplinary hearing was adjourned and reconvened on 6 March 2019. The claimant was informed that she was being dismissed for gross misconduct. A letter was sent to the claimant dated 12 March 2019 which addressed each of the allegations. The letter records each allegation (including the four sub-allegations) as each separately being found. In her evidence to the Tribunal, Ms Millard explained that for each of the allegations/sub-allegations she found them individually and separately (on

their own) to amount to gross misconduct. For each (on its own) the appropriate sanction was dismissal.

29. For the allegation that the claimant had said left right to the resident, Ms Millard stated that she had checked the care plan of the resident (that being resident Y) and she had identified that the care plan had recommended that the resident be encouraged to walk using the words 1,2,1,2. In her evidence to the Tribunal Ms Millard stated that using words which differed from those recommended in the care plan was, on its own, gross misconduct for which dismissal was the appropriate sanction.

30. For the majority of the other allegations, Ms Millard acknowledged that her findings were based on weighing the claimant's evidence against that of Ms Rothwell, and that she concluded on the balance of probabilities that she preferred the account of Ms Rothwell. No explanation was provided by Ms Millard in her decision letter as to how she reached this conclusion, when she had not heard evidence from Ms Rothwell herself.

31. In her evidence before the Tribunal, Ms Millard was very clear that she found and took into account what she concluded to be misconduct by the claimant in the way in which the resident was treated on 11 January. This was not recorded in her decision letter. It was not part of the allegations made against the claimant or identified in the invite letter which was sent to her. The events of 11 January were part of the allegation about the claimant's conduct towards colleagues only. Accordingly, Ms Millard in reaching her decision and deciding the appropriate sanction, determined and took into account her findings on something which was not an allegation made.

The appeal

32. The claimant appealed on the basis that she did not feel that the hearing had been fair or impartial. She also raised the lack of proof relied upon and the fact that the twenty minute summing up made by her representative appeared to have been ignored, and no questions or answers had been provided in response to the issues raised.

33. The appeal hearing was conducted by Ms Croucher, and took place on 5 April 2019. A note taker attended. The trade union representative also attended and read a statement of appeal incorporating eleven points. The Tribunal was provided with a note of what was discussed in the hearing. Ms Croucher did explore the allegations with the claimant.

34. Following the adjournment of the appeal, Ms Croucher undertook some further investigation into issues raised. The claimant expected to be invited to a reconvened appeal hearing after the investigations had been undertaken. In fact, following a telephone conversation in which the claimant was told that her appeal was not successful, the outcome was provided in writing only in a letter of 31 May 2019. In her evidence to the Tribunal, Ms Croucher explained that for each of the allegations and sub-allegations she found them individually and separately (on their own) to amount to gross misconduct for which the appropriate sanction was dismissal.

35. In her evidence to the Tribunal, Ms Croucher explained that she spoke to Ms Millard both before and after the appeal hearing, about the decision Ms Millard had reached. No record was made of this conversation, nor was any information provided to the claimant about what was discussed and how it impacted upon Ms Croucher's decision. The claimant was not given the opportunity to respond to anything which Ms Millard may have said to Ms Croucher.

36. Ms Croucher's evidence was that she considered the allegations to all relate to resident X. That is, she considered in the appeal an entirely different resident to the one considered by the person who made the decision to dismiss. Her evidence about who was the relevant resident was however confused in relation to the left, right allegation, as the only patient with Parkinson's and about whom there was the need to say left, right recorded in notes was resident Y (and not resident X). The claimant's evidence was that in the appeal hearing she was referring to resident Y.

37. In relation to the allegation about the claimant grabbing a resident's ear, in the appeal hearing the claimant provided an explanation which was the same explanation which she gave the Tribunal. The claimant's explanation was that she had assisted the resident by putting her hand around his head to stop him hitting his head on the fireplace, while he was being manoeuvred into an armchair near the fire. Ms Croucher confirmed in evidence that she accepted that the event could not have occurred as alleged by Ms Rothwell as she could not have seen what occurred as she alleged from the position in which she was stood. In her decision and her outcome letter, Ms Croucher effectively upheld the claimant's appeal on this allegation on the facts. However she decided that the claimant was guilty of misconduct (in a way which differed from that found by Ms Millard) for touching the resident's ear, and determined that of itself was dismissible.

38. In the appeal hearing the claimant provided an explanation for referring to a resident as stupid, which was the same explanation which she gave the Tribunal. Her explanation was that it was something she said in a soft way when trying to assist the resident when that individual had moved in a way which risked harm (saying "Y don't be so stupid you are going to hurt yourself" when his movement had almost resulted in him banging his head). Ms Croucher in her decision appears to have accepted this explanation, but concluded that the use of the word was always dismissible and would always be gross misconduct.

39. In terms of the lift used by the claimant, Ms Croucher asked the claimant to demonstrate in the appeal hearing the lift she had used. Ms Croucher's perception was that, when it was first demonstrated, the lift used by the claimant was an inappropriate drag lift. When the claimant demonstrated the lift for a second time in the appeal hearing, she performed an appropriate lift. In her evidence, the claimant denied this and alleged that when she gave the first demonstration she had put one arm across the resident's back, which was not an inappropriate drag lift. The decision in the appeal hearing made by Ms Croucher was based upon Ms Croucher's view of the lift demonstrated in

the hearing rather than upon what she concluded had occurred on 10 February.

40. Ms Croucher also considered that the use of the words left, right rather than 1,2 (as described in the care plan) to a resident constituted gross misconduct.

41. Following the adjournment of the hearing, Ms Croucher had some concern about which resident was the subject of the allegations. On 17 April 2019 she spoke to Ms Rothwell to confirm who the resident in her account was. It was confirmed to Ms Croucher by Ms Rothwell that the resident was resident X. Ms Croucher does not appear to have questioned this or considered that this may have brought into question the credibility of Ms Rothwell's original statement. Ms Croucher obtained a signed statement from Ms Rothwell.

42. During her evidence to the Tribunal and only in response to questions asked of her, Ms Croucher confirmed that this statement was provided at a probationary review meeting which resulted in the dismissal of Ms Rothwell. The claimant was not at any time informed of this, nor was she given the opportunity to explain to the respondent why this should impact upon the credibility and/or weight that Ms Rothwell's statement should be given. Perhaps more surprisingly, Ms Croucher's own evidence was that she did not feel that this merited any reconsideration of the weight which should be given to Ms Rothwell's statement.

43. Ms Croucher's evidence to the Tribunal was that she could not conceive of the possibility of anyone making such allegations without them being true.

44. The Tribunal finds that Ms Croucher had closed her mind to the possibility that the claimant had not committed the acts alleged and did not genuinely consider the claimant's appeal. She determined that Ms Rothwell must have been truthful when the allegations were made, without considering: the evidence; the grounds of appeal; inconsistencies in her determinations and Ms Rothwell's evidence (such as the conclusion on the ear allegation); or the change in circumstances by the time she made the decision.

45. Ms Croucher also obtained a further statement from one of the other witnesses, which provided further details about what was alleged to have happened. That statement explicitly refers to resident X. However, the statement also records the incident as having taken place at lunch, when all previous statements had timed the incident as occurring late afternoon. Ms Croucher does not appear to have considered whether this raised any question about the credibility of the witnesses or statements on which the decision had been reached, and did not provide the claimant with the opportunity to raise any arguments in the light of this statement.

46. Ms Croucher informed the claimant in a telephone call on 17 April that she had established that the resident to whom the allegations related was resident X and not a resident with Parkinson's, as the claimant had referred to in the meeting. Having established this, Ms Croucher did not undertake any further discussion with the claimant about whether there was anything she wished to say in the light of the fact that Ms Croucher was reaching a decision based

upon the treatment of an entirely different resident to the one who the claimant had believed was the subject of the disciplinary process. She also does not appear to have felt that further investigation or consideration was required. In her decision letter Ms Croucher states that the resident involved was resident X as a matter of fact (even though, as identified in the evidence to the Tribunal, the respondent's dismissing officer had reached a decision based upon her belief that the resident involved in the allegation was resident Y).

47. Ms Croucher provided no opportunity to the claimant to respond to the matters identified by her in her further investigations, nor did she meet with her to discuss what had been identified, prior to a decision being reached.

48. Following her decision, Ms Croucher notified the MASH team at Manchester City Council about the incidents on 10 January 2019 and identified the claimant as being the alleged source of risk. This report relates specifically to resident X and contains information specific to him. It explains that the claimant was dismissed. The respondent was subsequently contacted by the Disclosure & Barring service in relation to the adult's barred list (albeit there is no evidence available to the Tribunal that any further action has been taken).

The Law

49. The respondent bears the burden of proving, on the balance of probabilities, that the dismissal was for misconduct. If the respondent fails to persuade the Tribunal that it had a genuine belief in the claimant's misconduct and that it dismissed her for that reason, the dismissal will be unfair.

50. If the respondent does persuade the Tribunal that it held the genuine belief and that it did dismiss the claimant for that reason, the dismissal is only potentially fair. The Tribunal must then go on and consider the general reasonableness of the dismissal under section 98(4) Employment Rights Act 1996. That section provides that the determination of the question of whether a dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissing the claimant. This is to be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

51. In conduct cases, when considering the question of reasonableness, the Tribunal is required to have regard to the test outlined in **British Home Stores v Burchell [1980] ICR 303**. The three elements of the test are:

    (1) Did the employer have a genuine belief that the employee was guilty of misconduct?

    (2) Did the employer have reasonable grounds for that belief?

    (3) Did the employer carry out a reasonable investigation in all the circumstances?

52. The additional question is to determine whether the decision to dismiss was one which was within the range of reasonable responses that a reasonable employer could reach.

53. It is important that the Tribunal does not substitute its own view for that of the respondent, **London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220** at paragraph 43 says:

    "*It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question- whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal*"

54. It is important that the Tribunal does not substitute its own decision for that of the respondent. It is not for the Tribunal to weigh up the evidence that was before the respondent at the time of its decision to dismiss (or indeed the evidence before the Tribunal) and substitute its own conclusion as if it were conducting the process afresh. Whether or not the Tribunal considers the decision to be harsh is not the question which the Tribunal needs to determine, nor should a view that it is harsh alter the outcome (if the decision was within the range of reasonable responses). The key question is whether the decision was within the range of reasonable responses.

55. The Tribunal is required to take into account the ACAS code of practice on disciplinary and grievance procedures. The Tribunal considered all of the ACAS code, however of particular note are the following:

    a. Employers should give employees the opportunity to put their case before any decisions are made;

    b. The notification of the disciplinary case to answer should contain sufficient information about the alleged misconduct to enable the employee to prepare to answer the case at a disciplinary meeting; and

    c. Appeals should be dealt with impartially.

56. In reaching its decision the Tribunal took into account the submissions made by each of the parties and all matters referred to within them.

57. The claimant's representative referred to: **Trust House Forte Leisure Ltd v Aguilar [1976] IRLR 251**; **Maintenance Co Ltd v Dormer [1982] IRLR 491**; **Av B [2003] IRLR 405**; **Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721**; and **Crawford v Suffolk Mental Health Partnership NHS Trust [2012] IRLR 402**. The submissions made by the claimant have been considered but will not be reproduced in this Judgment.

58. In particular, emphasis was placed upon **A v B** as authority for the need for even handedness in disciplinaries which may result in dismissal, particularly where there are serious allegations of criminal behaviour in which findings that an employee has committed a serious offence may lead to an employee losing their reputation, their job or even the prospect of securing employment in the chosen field. That Judgment was summarised by the Court of Appeal in **Roldan** as follows:

    "*In A v B the EAT (Elias J presiding) held that the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field is potentially apposite*"

59. The respondent's representative referred in his submissions to **Burchell** and **London Ambulance Service v Small** as well as relying upon **Iceland Frozen Foods Ltd v Jones [1983] ICR 17.** The submissions made by the respondent have also been considered but will not be reproduced in this Judgment.

60. The Tribunal was also referred to **First Choice Homes (Oldham) Limited v Capon UKEAT/0049/11** in which the EAT say that "*It is, to repeat, essential in a gross misconduct dismissal that the employer be clear as to the nature of the misconduct in respect of which a dismissal is made*"

61. Each of the representatives in their submissions addressed what impact the issues around the identity of the resident should have on the Tribunal's decision. In summary, the respondent's representative submitted that the identity of the resident was not central to the issue and what mattered was the misconduct identified. The claimant's representative contended that the identity of the resident was central to the allegations which the claimant was being asked to respond to at the disciplinary hearing. The case she presented was all about resident Y. The residents were people and the details of who they were and why the claimant treated or addressed them as she did was fundamental to her response to the allegations and the case she presented.

62. In relation to **Polkey**, neither party referred to any specific law in their submissions, albeit it was agreed by the parties that the Issue of **Polkey** should be determined as part of this liability judgment. The Tribunal reminded itself of the guidance of the EAT in **Hill v Great Tey Primary School Governors [2013] IRLR 274** which said:

    "A "Polkey deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty that it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done ... the Tribunal has to

consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand."

Conclusions – applying the law to the facts

Why was the claimant dismissed? Did the respondent believe in the guilt of the claimant?

63. The Tribunal finds that the respondent did dismiss the claimant for misconduct. It was clear from the evidence of both Ms Millard and Ms Croucher that each of them concluded that the claimant had committed acts of misconduct and that was their reason for dismissing her (and not upholding her appeal). Ms Millard had a genuine belief that the claimant had committed misconduct.

64. In her submissions, the claimant's representative alleged bad faith, relying upon various indicators as demonstrating this. The Tribunal does not find that the claimant was dismissed in bad faith, nor does it find that matters such as the delay in the claimant being suspended or the fact that the respondent did not report matters externally (or at least did not for a considerable time) evidences that the reason for dismissal was not genuinely that evidenced by Ms Millard.

Fairness in all the circumstances

65. However, in looking at whether the respondent acted reasonably in treating the misconduct as a sufficient reason for dismissing the claimant and applying the section 98(4) test, the Tribunal does not find that the respondent did so.

66. The dismissing officer dismissed the claimant for misconduct involving resident Y, when the respondent's case was that the misconduct involved resident X (and the appeal was determined on the basis that resident X was the person involved).

67. As confirmed above, the Tribunal finds that the dismissing officer had predetermined the outcome of the process before she even heard from the claimant, meaning that the process was unfair. The dismissing officer also took into account one issue which she determined in her own mind was misconduct by the claimant, which was never part of the allegations made against the claimant nor was it recorded in the disciplinary decision.

68. The appeal hearing also had a number of elements which were irregular and undermined the fairness of the appeal process. The person hearing the appeal spoke to the dismissing officer outside of the process, about her decision. The appeal was decided based upon different matters than the previous decision. When further investigation was undertaken, the claimant was not provided with an opportunity to put forward her view on what was identified. The appeal was approached with a closed mind, not least because the person hearing the appeal had already determined that someone making an allegation like this would not have lied. The appeal decision was reached

about the treatment of a different resident to that considered at the dismissal stage.

69. With regard to the issues around the identity of the resident and the parties' submissions, the Tribunal is able to envisage some cases of misconduct where the precise identity of the resident involved would not be central to the issues in a disciplinary case. However, for the allegations made against this claimant and the case which she presented at the disciplinary hearing (and appeal hearing), the identity of the resident was fundamental. The claimant did not have the opportunity to present her case in response to the allegations, if she mistakenly believed they related to one resident when they in fact related to another. The Tribunal prefers the claimant's representative's submissions on this point, to those of the respondent's.

70. The investigation was fundamentally flawed (and therefore not as much as was reasonable in the circumstances) where the dismissing officer and the appeal officer each worked on the basis that it was a different resident referred to in the investigation report. This was to an extent illustrated by the fact that Ms Croucher felt the need to clarify who the resident was. Having done so, she provided the claimant with no opportunity to re-present her case or to explore what that mistake of identity may have meant for the case the claimant faced.

71. In any event, it is clear that the question of the resident's identity was fundamental to the credibility of Ms Rothwell and the others raising the allegations. As the decision to dismiss was ultimately made based upon an assessment of the credibility of those raising the complaint when compared to the claimant, the detail of the allegations and the response is central to the decision reached.

72. The Tribunal finds that the fact that (on the respondent's own case) Ms Millard dismissed the claimant for allegations which she believed to relate to the wrong resident, mean that the dismissal was unfair in all the circumstances of the case.

73. The Tribunal also find that the respondent did not comply with the three aspects of the ACAS code referred to at paragraph 55. As required, the Tribunal has taken this into account when determining that the dismissal was unfair.

74. The Tribunal has been mindful of the importance of not slipping into the substitution mindset. However, for the reasons explained, the Tribunal has found that in all the circumstances of the case, the dismissal was unfair.

Did the respondent have in its mind reasonable grounds upon which to sustain that belief?

75. In the light of the deficiencies identified in relation to the process, the Tribunal finds that the respondent did not have reasonable grounds in its mind upon which to sustain the belief in the claimant's misconduct. The respondent failed to fairly and reasonably take into account the evidence or consider the issues with the case against the respondent.

Did the respondent carry out as much investigation into the matter as was reasonable in all the circumstances of the case?

76. As identified above, the investigation itself was not very thorough. At the point when the decision was made, there had been no real investigation into matters raised by the claimant. In any event, where the decision to dismiss appears to have been based upon a belief that the treatment being considered was about a different resident to that which had been investigated, that investigation cannot have been as much as was reasonably required. The further steps undertaken at the appeal stage also illustrate that a reasonable investigation had not been undertaken. However, the way the appeal was heard and the absence of any opportunity for the claimant to address matters raised in the investigation following the appeal hearing, mean that the appeal did not resolve any deficiencies in the original dismissal.

Was the decision to dismiss fair? Did the decision to dismiss fall within the band of reasonable responses of a reasonable employer?

77. The claimant was dismissed as a sanction imposed for all of the findings of misconduct collectively made. The evidence of Ms Millard was that she would have dismissed as a result of finding misconduct for any of the five allegations (that is the first allegation, and the four sub-allegations of the second allegation). On this basis, dismissal was within the range of responses that a reasonable employer could reach. Dismissal was clearly within the range of reasonable responses in respect of the allegation that the claimant had lifted a resident with a drag lift or for grabbing a resident by the ear, for either of these allegations alone. This was effectively acknowledged by the claimant, both in what was said by her trade union representative in the internal proceedings and in the way her case was conducted at the Tribunal. It was argued on her behalf that if either of these allegations had been genuine they would have been raised at the time and escalated. The claimant's evidence in answers to questions during the Tribunal hearing was that a drag lift was illegal and was not a safe way to lift a resident. On the basis that two of the matters which were found at the dismissal hearing were, on their own, potentially reasonably dismissible by a reasonable employer, the decision to dismiss for all five allegations must fall within the range of reasonable responses (even where the gravity of the other allegations is not commensurate with dismissal).

78. The allegation relating to saying left right instead of one two as the words to assist a resident with walking issues, was one for which the Tribunal had some difficulty understanding why or how it could be misconduct at all, but certainly finds that on its own this could not possibly amount to something for which dismissal as the sanction could be in the range of reasonable responses (particularly without warning). The Tribunal found that Ms Millard's assertion that it alone was an allegation which was dismissible was so unsustainable that it further supported the Tribunal's conclusion that Ms Millard had predetermined that the claimant should be dismissed before hearing the claimant's case or considering the evidence before her.

79. Dismissal for either of the following would also have fallen outside the range of reasonable responses: what was found as the alleged misconduct towards

colleagues; and the single use of the word stupid in the context explained by the claimant. Neither of these could amount to something for which dismissal as a sanction for a one-off occasion could be in the range of reasonable responses. The same is also true for touching a patient's ear in the circumstances described by the claimant, as was accepted by Ms Croucher in the appeal as being what had occurred in relation to that allegation.

80. However, where the sanction for the misconduct was determined collectively for findings which included the alleged drag lift, the decision to dismiss did fall within the range of reasonable responses.

*Does the **Roldan** and **A v B** principles apply?*

81. The Tribunal finds that this is a case where, when considering the relevant circumstances under section 98(4), the gravity of the charge and the potential effect of an adverse finding on the claimant and her ability to work within her chosen field, must be taken into account. The potential impact of the respondent's findings on someone who has worked for many years in the care sector is self evident, but in this case was illustrated by the information provided by Ms Croucher to the relevant safeguarding team at the City Council (which refers directly to the claimant and her dismissal), and the correspondence from the Disclosure and Barring Service. This is therefore a case to which the circumstances to be taken into account are those highlighted in **Roldan** and **A v B.**

82. As explained above, the Tribunal finds the limited investigation undertaken and the flaws in the process followed to be such that the dismissal is unfair in all the circumstances in any event. However, when the gravity of the charge and the seriousness of the outcome on the claimant's ability to pursue her chosen career are also taken into account, the Tribunal certainly finds the dismissal to be unfair (in the relevant circumstances).

Polkey

83. The flaws in the respondent's process are such that it is very difficult for the Tribunal to determine whether the claimant would have been dismissed in any event if a fair procedure had been followed, as required in considering the issue of **Polkey**. This case is a long way from being one in which it can be said with any certainty that the claimant would have been dismissed had a fair process been followed.

84. However, the question which the Tribunal needs to assess is could the respondent have been fairly dismissed and, if so, what are the chances that this actual employer would have done so? This is not an assessment of a hypothetical fair employer, but an assessment of what this employer would have done if it had hypothetically acted fairly. This is an assessment of chance. In assessing the likelihood of a fair dismissal it is necessary to consider what would have occurred with this employer had a fair process been followed – would the claimant still ultimately have been dismissed by the respondent? This is an assessment of this case and where it falls on the spectrum between the two extremes referred to in **Hill.**

85. With regard to the allegation regarding the alleged drag lift, there is a realistic possibility that this employer (and in particular Ms Millard) would have dismissed the claimant had a fair procedure been followed. Assessing this case and where that possibility falls on the spectrum, the Tribunal finds that it is just and equitable to reduce any award in accordance with *Polkey* principles by 20% to reflect this possibility.

Conclusions

86. As outlined above and for the reasons given, the claimant succeeds in her unfair dismissal claim.

87. At the end of the Employment Tribunal hearing, when judgment was reserved, it was listed for a remedy hearing for one day on Tuesday 19 May 2020.

88. In advance of that hearing, the parties must ensure that the case is prepared for remedy to be determined on that date and should also undertake the following steps:

    a. The claimant must provide an updated schedule of loss to the respondent by no later than Monday 6 April 2020;

    b. The respondent must inform the claimant by no later than Wednesday 15 April 2020 what in the schedule of loss is disputed and what is agreed (this can be undertaken by producing a counter-schedule if preferred);

    c. If either party wishes to rely upon any documents at the remedy hearing (which have not already been included in the bundle prepared for the Tribunal hearing) those documents must be listed and copies sent to the other party by no later than Wednesday 22 April 2020;

    d. The respondent should prepare a bundle of documents for the remedy hearing, indexed and paginated and send a copy to the respondent no later than Wednesday 29 April 2020 (the content to be agreed if possible – the respondent should also bring copies to the remedy for the hearing for the Tribunal and the witness table); and

    e. By no later than Wednesday 6 May 2020 each party must have provided to the other a written statement from every person (including the claimant) that it is proposed will give evidence at the final hearing. Unless the Tribunal directs otherwise at the remedy hearing, the witness statement(s) will be read at the remedy hearing, stand as the evidence of each witness before they are questioned by the other party, and any statements disclosed after this date may not be relied upon at the remedy hearing without permission from the Tribunal.

Employment Judge Phil Allen

6 March 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON

10 March 2020

FOR THE TRIBUNAL OFFICE