



THE EMPLOYMENT TRIBUNALS

Claimant: Mrs. A. Oluwole

Respondent: Unity Works

On: 12th and 13 March 2020

Employment Judge: Ms S. Sharma

Appearances

For the Claimant: Mr H. Anylam, Solicitor

For the Respondent: Ms S. George, of Counsel

REASONS OF THE EMPLOYMENT TRIBUNAL

A: BACKGROUND

1. By issue of a claim form to this Tribunal received on 24 September 2019, the Claimant brought a claim for unfair dismissal against the Respondent.
2. At the start of the Tribunal hearing before me, I reminded the parties that the hearing would be conducted in line with the overriding objective and their cooperation to achieve this was duly sought. This was indeed given.
3. Two witnesses gave evidence on behalf of the Respondent; Mr Chirdaris, the operations manager who conducted the disciplinary hearing and Ms Largin, the CEO of the Respondent who conducted the appeal hearing. The Claimant also gave evidence. All three witnesses gave oral evidence under oath or by way of affirmation and submitted witness statements as their evidence in chief. All these were taken into account in making my decision.
4. In reaching my decision, I also took account of a bundle of documents, which the parties agreed were agreed. This comprised 127 pages.

B: THE ISSUES

On 5th March 2020, both parties issued their own list of issues to this Tribunal. I reviewed these lists before the hearing and proposed the following as the list of issues to be determined. Both parties agreed with these issues.

1. Was there a potentially fair reason for the Claimant's dismissal (the Respondent relies on conduct)? Under the law, conduct is a potentially fair reason for dismissal.

1.1 Did the Respondent hold a genuine belief in the Claimant's gross misconduct?

1.2 Did the Respondent have reasonable grounds for that belief?

1.3 Was the Respondent's belief based on a reasonable investigation?

The Claimant stated that the Respondent failed to carry out as much investigation as was reasonable. She states that the decision to dismiss was based on statements of two people (Luke and Serene), who were not present but those present were not interviewed because they would have difficulty remembering events.

2. Was the Respondent's decision to dismiss the Claimant within the band of reasonable responses available to the Respondent?

The Claimant alleged that the decision to dismiss was premeditated and biased.

4. Procedure

4.1: Did the Respondent follow a fair procedure in taking the decision to dismiss the Claimant? Did the Respondent comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

4.2 If the Claimant's dismissal was unfair on procedural grounds, then would the Claimant have been dismissed in any event had a fair procedure been followed. If so, to what extent and when?

5. Contributory conduct

If it is found that the Claimant had been unfairly dismissed, did the Claimant contribute to his dismissal by any culpable conduct? If so, by what proportion should the compensation award be reduced as a result?

C: FINDINGS OF FACT

1. The Claimant was employed by the Respondent from 16 June 2003 to 19th April 2019 as a training project worker with the job title of second chef. The Claimant was originally employed by the Camden Society but transferred under TUPE to Unity Works.
2. The Respondent is a charity which supports people with learning difficulties. It provides support and services for people with learning disabilities. One way in which it does this is by running eight social enterprise cafés.
3. The Claimant's job involved supporting and training people with learning disabilities whilst preparing sandwiches and salads in the café and cold food for hospitality events. The Claimant was in a position of responsibility for those people she trained with learning disabilities. In examination in chief, the Claimant explained how her role was to help those with learning disabilities to build and live in confidence.
4. The Claimant was based in one of the café's at Tooley Street. It was Mr Chirdaris' evidence that at Tooley Street, there are two kitchens in close proximity. The Claimant worked only in the cold kitchen.
5. In relation to the TUPE transfer which was effective from 1 January 2019, the Camden Society was restructured. Two new organisations were created in London, Unity Works (namely the Respondent) and the Camden Society London. The social enterprise cafés fell within the new organisation Unity works. The reorganisation was summarised in a letter to colleagues dated 4 December 2018 (30) which under the heading "What does this mean for you?" stated: "these changes will now take effect on 1 January 2019. On this day your employment will transfer to Unity works. Please be assured that the transfer will not affect your continuity of employment, this will be preserved."
6. It was the Claimant's case that because letters and emails were received by the Claimant referring to the termination of her employment, her dismissal was in effect pre-determined. An email dated 31 December 2018 (32) from the payroll team addressing the Claimant direct stated that her current role ended from 31 December 2018. As she was moving to a new subsidiary, she would be issued with a P 45. The Claimant received a further email on 29 January 2019 from the payroll manager (33) which referred to the Claimant's employment transferring from the Camden Society to Unity works. It also referred to a P 45 stating that the Claimant's employment would end with the Camden Society as at 31 December 2018. The email stated that "*this is required as part of the transfer process and you need to keep this for your records. Please be assured all of your previous employment information and terms and conditions*

of employment, including HMRC data has also been transferred onto your Unity Works record.” The email ended with: *“Thank you for your continued cooperation regarding the transfer.”* A further email was received by the Claimant on 22 February 2019 (34/35) which stated that if the Claimant was moving to a new subsidiary then she would be made a leaver and be issued with a P 45.

7.It was the Claimant’s case that these emails demonstrated that the Claimant’s dismissal was predetermined.

8.During cross-examination of Ms Largin, she stated that the email of 31 December 2018 was an automated email and sent by payroll to all people who were transferring or who were leaving. She had herself received such an email as did her colleagues. There was nothing in the bundle of documents to indicate that these had been sent to other people. Although there was a reference to the P 45, the email also referred to the transfer. Ms Largin stated that following the email of 31 December 2018 (32) she sent an email to all employees to explain that such an email was a payroll matter and that their employment would continue.

9.During cross examination of the Claimant, she confirmed that her employment was transferred to the Respondent and that from 1st January 2019, she continued to work for the Respondent. She stated that all trainees were transferred as were others. She stated that at the time of receiving the email, she put no meaning to this email. However, when she was dismissed, she thought back to the email even though after receipt of such email her employment had continued. In her letter of appeal dated 25 April 2019 (71) no reference to the email of 31 December 2018 had been made to her current position that the dismissal was premeditated.

10. I make the following findings of fact: –

- (a)The dismissal was not premeditated. The Claimant was dismissed because of the alleged slapping incident, which the dismissing officer found had occurred.
- (b) The generic letter of 4 December 2018 made clear that the recipients’ employment was transferring to the Respondent and employment would continue.
- (c) The email of 31 December 2018 referred to the employment ending from 31 December 2018 but made clear that for those moving to the new subsidiary, there was a continued start date.
- (d) Notwithstanding that the emails referred to termination of employment, the Claimant did indeed confirm that she continued her role from 1 January 2019.

The Alleged Incident

11.The alleged incident, which led to the Claimant’s dismissal, took place on 27 Feb 2019.One of the catering assistants, Pascal, who has autism was working in the cold kitchen with the Claimant. He alleged that the Claimant had shouted at him and slapped him on the wrist.

12.The Claimant was off sick from 28 Feb 2019 to 8 March 2019.

13.When the Claimant returned to work on 8 March 2019, Helen Smith, the employment services manager and the person who conducted the investigation, spoke with the Claimant to inform her that she was being suspended from her duties whilst this allegation was investigated. The conversation was followed up with a letter of suspension dated 8 March 2019 (39).

14.As is made clear in the cross-examination of the Claimant, there was no dispute between the parties that it is only on 8 March 2019 that the Claimant was made aware of the allegation against her.

Investigation

15.The Employment Service Manager, Helen Smith, was appointed to investigate the incident.

16. Ms Smith produced an investigation report (41 to 58). The report (41) stated how Pascal had reported to Luke Roberts, the café manager and the Claimant’s line manager, how the Claimant had slapped him on the wrist. Luke

reported this to Milly Wheeler, the centre manager. As part of the investigation, Luke, Seren, Pascal and the Claimant had been interviewed. The report stated that trainees who may have been present during the incident were not interviewed as part of this process as they all would have difficulty remembering events prior to the current day.

17. The report made the following points :-

- (a) Reference was made to paragraph 5.1.4 of the disciplinary policy (107) which described “assault or threatened assault (whether physical or verbal)” as examples of behaviour which normally would be regarded as gross misconduct.
- (b) All interviewees had been sent records of the interview to amend and change as they saw fit (42).
- (c) Pascal was interviewed on 28th February 2019. The Claimant was interviewed when she returned on 8 March 2019 and subsequently on 11 March 2019. Luke and Serene were interviewed on 8 March 2019 and again on 14 March 2019.
- (d) Pascal was “very clear that the incident had taken place. He reported this consistently to Luke and Seren. He was clearly distressed and stated that his wrist hurts following the incident.”
- (e) It was a very busy and stressful day at the café with a number of hospitality orders due to be delivered and Luke was coordinating an event off site.
- (f) The Claimant was consistent that the alleged incident did not happen and she had never shown physical or verbal aggression to members of staff or trainees.
- (g) Luke was not present in the kitchen at the time of the alleged incident but it was clear to him that Pascal was very distressed and that Pascal had never alleged an incident of this nature previously.
- (h) Seren also reported that Pascal was distressed and clear about the alleged incident.
- (i) Due to the busy nature of the day, it had been difficult to establish consistency regarding timings of the alleged incident. In addition, any trainees that may have been present in the kitchen did not have the mental capacity to recall if any such incident took place.
- (j) From Pascal’s past employment history, there was no reason to doubt his allegation. Further, he was consistent throughout on the fact that he presented. The Claimant was adamant that the incident did not take place.

18. It was the Claimant’s position that the investigation was flawed because all those who could potentially have been interviewed, two being Monica and Harry, had not been interviewed.

19. When being cross examination on this point, it was Mr Chirdaris’ evidence that both Harry and Monica do not have the mental capacity to give statements. Neither communicate well and are unable to retain information. In the cross-examination of Ms Largin, it was also her evidence that some of those who may have been present did not have the mental capacity to give evidence. It was her evidence that the managers made this decision; they work with people with special needs on a daily basis and therefore are capable of making this assessment. Ms Largin stated that although Monica and Harry may have been present in the small kitchen at the time of the allegation, they would not be able to have answered questions. If asked a question, Monica, for example was likely to have just repeated the question back rather than answering it.

In the cross-examination of the Claimant, it was the Claimant’s evidence that she was not aware that Harry’s understanding was reduced. In relation to Monica, she did not accept that she would repeat a question back or that she would be unable to communicate. It was the Claimant’s evidence that there would be ways and means of obtaining information from Monica.

20. I find that the investigation was not flawed by reason of those who may have been present, two being Harry and Monica, not being interviewed on the basis that the managers who worked in close proximity with them, had made an assessment that they would not be capable of giving evidence. The Respondent had made this decision, bearing in mind that other witnesses (namely Luke, Serene and Pascal himself) had given evidence in relation to the incident of 27th February. Therefore, interviewing those with limited communication skills would not assist. I find that the Respondent had acted reasonably in making this decision.

21. It was further the Claimant's position that the Respondent was acting unfairly by not calling all witnesses to this tribunal hearing who could have been called. Pascal, Luke and Helen, the investigator, were named as those who should have been called. When cross-examined on this point, Mr Chirdaris stated that the Respondent had gone through a process of investigating the matter and following the investigation, had concluded that Pascal was to be believed. The Respondent is responsible for Pascal. The tribunal hearing relates to how the Respondent handled the allegation which led to the Claimant's dismissal. Ms Largin was cross examined on this point and it was put to her that Pascal should have been called as a witness to this tribunal hearing particularly as he gives speeches. It is therefore odd that he was not a witness to the tribunal hearing. Ms Larkin stated that the tribunal hearing relates to the Respondent and the decision makers. Mr Chirdaris and herself were the decision-makers and were therefore the witnesses at the tribunal hearing.

22. I make the following findings:-

(a) The tribunal hearing relates to the dismissal of the Claimant and whether the Respondent had acted fairly or unfairly in its decision to dismiss. The decision makers were present at the tribunal hearing.

(b) In my determination as to whether or not the dismissal was fair or unfair, it was not relevant that those who were interviewed at the investigation stage needed to be present at the tribunal hearing. What was relevant, however, was that the decision-makers were present, which they were.

I find therefore that no unfairness has arisen as alleged by the claimant as a result of Pascal, Luke and Helen not being called as witnesses to the Tribunal hearing.

23. The investigation report comprised the witness statements of the Claimant, Luke and Seren and Pascal.

24 In Pascal's statement dated 28 February 2019, he stated that it was a busy day and both the Claimant and himself were stressed. When Pascal reached for something in the kitchen, the Claimant shouted and slapped his wrist which hurt and was red. Thereafter she continued to work and did not acknowledge what had happened. He then went for a break and told Luke and Seren what had happened. He stated that Abbey (namely, the Claimant), was a nice and kind lady but firm. Pascal's statement was not signed or dated.

25. In the Claimant's statement, dated 8 March 2019 she denied that this had taken place. Her statement included a statement which she had sent to Helen by email. In her statement, she stated that there were five people in kitchen, namely, Pascal, two apprentices and one service user and herself. (Two, namely Harry and Tavis were normally based in the larger kitchen). When Pascal returned from delivering the trolley, he was upset so she reassured him and asked him not to worry. This, according to the Claimant, was because Luke had had an outburst. For the rest of the day, Pascal and the Claimant worked together and apart from an outburst by Luke, there was no shouting. The Claimant's statement was not signed or dated.

26 In Luke Roberts' statement dated 8 March 2019, he stated that Pascal was on his break and as he walked past him, he looked upset. When he asked him what was up, he stated that Pascal said that the Claimant had shouted at him and slapped him on the wrist. As Luke had a courier waiting for him to leave, he asked Pascal to talk to Serene. Serene phoned Luke later to confirm that there was an incident and that Pascal had stated that the Claimant had shouted at him and slapped his wrist and it had hurt. According to Luke, there were no trainees in the kitchen. Pascal had never before said that he had been hit and had never raised any previous incidents. In relation to the timing, Luke was not completely sure but thought it was around 12:30 pm. Luke was asked if he had raised his voice. He stated that he was displeased because of the lateness and this was reflected in his voice. In relation to who was in the kitchen at the time of the incident, Luke said that he did not know as he only was popping in and out. Monica was working there but she took regular breaks due to her needs and would not have the capacity to understand if asked. Luke was then questioned on the events of 26 February 2019, where he was waiting for a list of allergens. Luke's statement was not signed or dated.

27. Serene's statement was dated 8 March 2019. She referred to her conversation with Pascal who looked sad. He told Serene that it had been a stressful morning and that the Claimant had slapped him. There were no marks on his wrist. Pascal was crying and quite upset. Serene's statement was not signed or dated.

28. At the Tribunal hearing, Mr Chirdaris was cross examined on dismissing the Claimant based upon hearsay evidence in relation to the statement of Luke and Seren. Further, there was no corroboration in that there was no independent evidence like for example a CCTV camera. It was Mr Chirdaris' evidence that this was a case of one person evidence against another. He had no reason to disbelieve Pascal. Pascal's evidence was supported by Luke and Serene's statement. When Miss Largin was cross-examined on this, it was her evidence that where there was a case of one person evidence against the other, it was necessary to weigh up what one thought happened. One had to decide what was on balance right.

29. Mr Chirdaris was cross examined on the nature of the allegation made against the Claimant, namely that of assault and why a more thorough investigation had not been carried out. It was Mr Chirdaris' evidence that the necessary people who could be interviewed were interviewed. When cross examined on whether a slap on the wrist was an assault in line with the Respondent's policies, it was Mr Chirdaris' evidence that for a vulnerable person with learning disabilities, this could be akin to a more serious assault on someone else.

30 I make the following findings of fact in relation to the investigation: –

- (a) The Claimant's case that the investigation was flawed because the evidence used to dismiss the Claimant was based on hearsay evidence and was not corroborated did not in my determination make the investigation one which a reasonable employer would not have carried out. Mr Chirdaris' position that he believed Pascal and not the Claimant based on Pascal's statement supported by the statements of Luke and Seren was one which fell within the band of reasonable responses.
- (b) Where there was a situation of there being one person's word against the other, it was reasonable for the employer to assess what on balance may have happened based on the statements and investigation report. This is the stance Ms Largin took. Such a response was a reasonable one to have taken.
- (c) In relation to the nature of the assault and whether a more thorough investigation should have been carried out, I find that the investigation carried out and the people who were interviewed and those who were not for the reasons that they could not be interviewed because of their disability was a reasonable one in the circumstances and taking into account the nature of the Respondent organisation.
- (d) It fell within the band of reasonable responses for the Respondent to consider what effect a slap on the wrist could have on Pascal given his vulnerability compared to the effect this would have on somebody who did not share his vulnerability.
- (e) Before me, the Claimant's representative raised the issue of Pascal's written statement not being signed in his submissions. This was not a matter which had been raised by him during cross examination of the Respondent's witnesses. I find that this did not make the investigation flawed on the basis that none of the witness statements had been signed. Further, this was not a point which had been raised by the Claimant either during the disciplinary or the appeal meeting.

24 March 19 : Invite to Disciplinary Meeting

31. By letter dated 24 March 2019, the Claimant was invited to a disciplinary meeting scheduled to take place on 1 April 2019. This actually took place on 5th April 2019. The Claimant was informed of her right to be accompanied and she was informed that a possible outcome could be summary dismissal.

32 The Claimant sent further information by way of a statement dated 1 April 2019 where she stated that during her meeting of 12 March, Helen was going to send her a write-up of the discussion which she had not received and therefore she was writing the statement to confirm the discussion. The statement referred to the events of 26 February when Luke had allegedly upset Pascal on more than three occasions including text messages. This made Pascal agitated and anxious. She supported Pascal at that time on that day.

5 April 19: Disciplinary Hearing

33. The disciplinary hearing took place on 5 April 2019. I reviewed the manuscript notes of such meeting (62). The notes recorded that the Claimant was told she could be accompanied but decided to attend alone. She was asked if she had seen a copy of the investigation report and statements. She said that she had not and therefore the HR partner, Ged Blake, adjourned the meeting to enable her to read these and offered to postpone the meeting until the following week. The adjournment took place for 35 minutes. When the meeting reconvened, Jade, also present at the meeting, stated that the document was sent on 2 April and the Claimant had responded by email. She was asked if she had had enough time to look through the report and if she was happy to continue. She confirmed that she was.

34 By letter dated 19 April 2019, Mr Chirdaris informed the Claimant of the outcome of the disciplinary hearing which was to dismiss the Claimant summarily. Mr Chirdaris concluded that the Claimant's conduct constituted gross misconduct and was sufficiently serious to warrant summary dismissal.

The following points were made in the dismissal letter :-

(a) He concluded that the shouting and the slapping did take place. Having read the interview statements, two entirely different versions of events were expressed by Pascal and the Claimant. Pascal's interview answers were concise and did not change from the day he made the accusation and were consistent with the statements of Serene and Luke. There was no benefit for Pascal to accuse the Claimant and the Claimant could not provide Mr Chirdaris with any reason as to why Pascal would lie. The Claimant did not acknowledge the incident at all. The Claimant confirmed to Mr Chirdaris that Pascal was not known to lie and she could not think of a reason why he would.

(b) At the disciplinary hearing, the Claimant went into detail about the events of 26 February. Mr Chirdaris believed that there was no relation between the two events. Pascal had not commented on Luke acting inappropriately. The event of 26 February was not a reason to accuse the Claimant of physical misconduct.

(c) There were inconsistencies in the Claimant's version of events, she having described the day as busy and stressful in her statement but in the interview she described the day as being calm and the hospitality not being late. Both Pascal and Luke said the hospitality was late.

(d) The Claimant was informed of her right to appeal.

35. In cross-examination of Mr Chirdaris, he was questioned on the Claimant's period of employment of 15 years and how there had been no previous allegations against her. It was Mr Chirdaris' evidence that Pascal had also been there a long time and had never made the allegation before. He further stated that the incident, given the Claimant's length of service, was not expected; however, because it was not expected, one could not say that it did not happen.

36. The letter of dismissal was dated 19 April 2019 which was Good Friday. When re-examined on this point, Mr Chirdaris stated that he himself typed up the letter and then had sent this onto HR to put on their letterhead.

37. Mr Chirdaris was re-examined on why others were not interviewed and whether he accepted that there were others in the kitchen when the incident happened. It was his evidence that he thought it was just Pascal and the Claimant who were in the kitchen at the time of the incident. It was a small, busy room and at around 11:15 am, it was unclear as to who else was in the room.

38. In relation to the Claimant's position that she had not received the investigation notes prior to the disciplinary meeting, the manuscript notes of the disciplinary hearing referred to Jade stating that these had been sent to her on 2nd April 2019 and that she had responded to the email of 2 April 2019. At the appeal hearing of 20 May 2019 (76) the Claimant went through the investigation notes again and confirmed that she had received the notes but had not noticed them until the day of the disciplinary hearing.

39. During the cross-examination of the Claimant, she stated that Mr Chirdaris had made the wrong judgement in believing Pascal even though Pascal does not lie. It was equally the case that she had not slapped Pascal.

40. I make the following findings of fact:-

(a) In making the decision to dismiss the Claimant, Mr Chirdaris had a genuine belief, based upon reasonable grounds that the Claimant had slapped Pascal. The genuine belief was based upon the statements of Pascal, Luke and Seren. Such statements gave Mr Chirdaris reasonable grounds to believe that the slap had taken place. It fell within the band of reasonable responses for Mr Chirdaris to conclude that given that Pascal had never lied, there was no reason for him to lie now.

(b) Even though the Claimant had no allegations made against her, it fell within the band of reasonable responses for Mr Chirdaris to consider that because it had not happened previously did not mean that it did not happen on 27 February.

(c) Given the nature and circumstances of the Respondent and its support of people with learning difficulties, it fell within the band of reasonable responses for Mr Chirdaris to consider the effect of a slap on the wrist on a vulnerable person. It is for this reason that he decided to dismiss, notwithstanding the 15 years' of unblemished service of the Claimant. Given the nature and circumstances of those who the Respondent supported, this response fell within the band of reasonable responses.

(d) It fell within the band of reasonable responses for Mr Chirdaris to consider how Pascal's statement had been consistent whereas the Claimant's had inconsistencies when compared with the comments made by her at the disciplinary interview. It was reasonable for him to then conclude that because of the consistencies of Pascal statement, he was to be believed.

(e) Because the dismissal letter was dated 19 April 2019, Good Friday, I find that this did not mean that the letter had been fabricated or had not been written by Mr Chirdaris. I accepted Mr Chirdaris' statement that he had written it and then this had gone off to HR for "topping and tailing."

(f) It was not unreasonable for Mr Chirdaris to conclude that there were not five people in the kitchen as the Claimant had alleged given the size of the kitchen and given that two of the people (Harry and Tavis) were normally based in the other kitchen.

(g) Mr Chirdaris' conclusion that the event of 26th February did not mean that the slap had not occurred on 27th February and that the two matters were not linked, was a reasonable conclusion.

(h) On a balance of probability, the Claimant had received the notes of the investigation by the date of the disciplinary meeting. This is because the notes of the disciplinary meeting referred to the Claimant as acknowledging the email of 2nd April, attached to which was the notes. The Claimant did not dispute this at the disciplinary meeting. At the appeal hearing, she confirmed that she had received them but had not noticed them until the date of the hearing.

25 April 19: Claimant's Letter of Appeal

41. By letter dated 25th April 2019, the Claimant appealed the decision to dismiss her. One ground of appeal was that she found it discriminatory for the panel not to accept her account of what actually happened but to believe Pascal

instead. She referred to her 15 years' service and how no complaint had been previously made against her. She wanted the appeal panel to consider whether dismissal was the correct response where alternative sanctions could have been imposed like a transfer or a demotion.

42 The appeal hearing was chaired by Ms Largin and took place on 20 May 2019. The outcome of the appeal meeting was set out in a letter to the Claimant dated 17 June 2019, where the decision to dismiss was upheld.

43 It was recorded in the letter that the Claimant was given an opportunity to present additional information arising from the investigation report. Ms Largin concluded that the process followed was a fair one and in line with the Respondent disciplinary policy. Ms Largin stated that she had concluded that Pascal's comment that she was a nice lady had been taken into account by the disciplinary panel.

44 In Ms Largin's witness statement (21) she stated that after the appeal hearing she had spoken, to a Milly Wheeler (who had previously worked with Pascal) to explore why Pascal had continued to work with the Claimant after the alleged incident. She had taken into account Milly's comments that from own her experience of working with Pascal , when he got upset he would continue to work .He would want to get the task finished. Pascal would not express that he did not want to work with somebody easily. Further Pascal would not want to get people into trouble or take sides or cause conflict.

45 It was Ms Largin's decision that on a balance of probabilities, the slap had taken place. According to her, the decision to dismiss was the right decision given that the Respondent exists to support people with learning disabilities .Further, the Claimant had not acknowledged the incident at all .Thus, if a lesser sanction was given resulting in the Claimant remaining in employment, she felt that she would be putting people who the Respondent trained at risk. Because the allegation related to physical action, it was too much of a risk to retain her; the Respondent's primary duty of care was to keep people safe. Some of the people employed by the Respondent were not in a position to verbalise like Pascal had been able to.

46. In cross examination of Ms Largin, and when questioned on whether dismissal was the appropriate sanction, she stated that she took account of the matter that the Claimant occupied a position of responsibility. Notwithstanding her 15 years' service, it was still necessary to listen to Pascal who had been there for nine years and had worked with the Claimant for two years. A slapping incident had to be investigated.

47. I make the following findings of fact: –

(a) I found the appeal process to be a fair and reasonable one. Ms Largin had given the Claimant an opportunity to make notes of the investigation report even though the Claimant had confirmed at the appeal meeting that she had received the investigation report prior to the disciplinary meeting but had not noticed it.

(b) It felt within the band of reasonable responses for Ms Largin to conclude that on a balance of probabilities, the slap had taken place, based upon the investigation report and the conclusions reached at the disciplinary meeting.

(c) It fell within the band of reasonable responses for Ms Largin to consider the reason for the Respondent's existence namely that it had a primary duty of care to keep people safe and in the circumstances, it was reasonable to uphold the decision to dismiss, particularly considering not all those for whom the Respondent was responsible would be able to verbalise any incidents.

D: SUBMISSIONS

In making my decision, I took account of the extremely helpful submissions made by both Mr Anylam, on behalf of the Claimant and by Ms George on behalf of the Respondent and I am grateful to both of them for these.

Summary of My Anylam's Submissions

1. Because the Claimant had received a P45 on 31 December 2019, the decision to dismiss was premeditated.
2. The alleged slapping incident of 27 Feb 2019 did not happen.
3. The investigation was flawed as not everyone who was present during the alleged incident was interviewed.
4. When it was one person's word against another, it was necessary to have corroborative evidence like a CCTV camera before action like dismissal took place.
5. The Claimant should not have been dismissed because of her unblemished record.

For the reasons set out in my findings of fact, I did not concur with Mr. Anylam's submissions.

Summary of Ms George's Submissions

1. Did the Respondent have a genuine belief in the Claimant's gross misconduct?

(a) This was not a premeditated dismissal because of the P45 being sent on 31 Dec 19. The TUPE did not terminate her employment but continued it. The email of 31 Dec was an automated email.

(b) Even though Mr Chirdaris' dismissal letter was dated on Good Friday, there was no question that he had wrote it. This was his decision, Thus, the fact that this was dated on a bank holiday is irrelevant.

2. Reasonable grounds for belief.

(a) Both Mr Chirdaris and Ms. Largin acknowledge that this was a case of one person's word against another. Both made a decision on hearsay and lack of corroboration but Mr Chirdaris decided to believe Pascal set out in his letter.

Mr Chirdaris' assessment that the Claimant's account relating to Pascal being upset was targeted at a different point in time to that of Luke and Serene's account. The Claimant's observation was that Pascal was upset an hour earlier. Two conclusions can be made from this:-

- (a) The Claimant's account of who may be relevant witnesses was not directed to the relevant point in time; and
- (b) The Claimant's explanation of Pascal upset, did not address the observations of Luke and Seren.

This was not a decision based on hearsay: There was corroboration. This was not a situation where the Respondent was looking at a single account. Pascal's account was consistent and repeated by the observation of Luke and Serene.

Further, Mr Chirdaris took account of personalities: Pascal did not lie. Mr. Chirdaris made his decision on the basis of Pascal's account and thus, his decision was not based on hearsay.

3 Was there a sufficient Investigation, which was within the band of reasonable responses.

(a) In the Claimant's appeal letter, she did not raise the issue of those who could have been present were not interviewed.

(b) In relation to those not called, the Respondent was in the best position to judge whether Monica and Harry could provide statements which could be relied upon. This is a decision a reasonable employer would have taken.

4. Was this a fair or unfair dismissal in the circumstances?

4.1 Procedure

(a) The only criticism of the procedure related to the investigation: the allegation was made on 27 Feb. After that day and 8 March, the Claimant and Pascal did not work together On 8 March, she was suspended. She sent a statement which was incorporated into her account. She was interviewed again and sent all the info before 5 April. She set another statement on 1 April. It could be seen from the appeal notes (76) that she acknowledged the notes in advance of the disciplinary hearing but had not read the pack.

(b) She was offered the opportunity to have a companion and was offered a postponement and to read docs. She declined both.

(c) The appeal process itself was a fair one.

The Respondent therefore argues that the procedure was fair.

4.2 Was Decision to Dismiss Within the Range of Reasonable Responses

(a) The fact that she had 15 years of an unblemished record did not mean that the incident did not happen. The length of service tells you that the incident was unexpected. You cannot say, however, that it did not happen. Pascal alleged he had been hit and he was long standing employee. He had 9 years' service during which he had not made a complaint or known to lie.

(b) The Respondent supports vulnerable people. Ms Largin explained the importance of protecting those staff who are non-verbal: There are others who cannot verbalise incidents.

(c) Once the Respondent concluded that the Claimant had slapped Pascal, they had no choice.

(d) Mr Chidaris stated that had she admitted it, he would have decided differently.

5. Liability:

In relation to both Polkey and contributory conduct, the Respondent relied upon Pascal's statement: The fact that Pascal continued to work notwithstanding the alleged incident was explained by Milly; it was his character to have carried on. He would not express that he did not want to work with anyone. The conduct of slapping did indeed take place.

For the reasons set out in my findings of fact, I accept Ms George's submissions.

E: THE LAW

1. S 98 (2) (b), Employment Rights Act 1996 ("ERA") : Conduct is a potentially fair reason for dismissal

2. **BHS v Burchell**: This Tribunal applied the principles established in the case of **BHS v Burchell ([1980] ICR 303, [1978] IRLR 379)**, a case relevant in establishing both the reason for dismissal, but also relevant to the question of whether it was reasonable for the Respondent to treat that reason as a sufficient reason to dismiss in the circumstances under s 98 (4), ERA

Where the employer suspects misconduct, the Burchell test requires an employer to show that: -

- (a) It had a genuine belief that the employee was guilty of misconduct;
- (b) It had in mind reasonable grounds upon which to sustain that belief; and
- (c) At the time of forming that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

The Tribunal noted that it is not a matter for an employer to conclusively prove the employee's misconduct; it is a matter for the employer to demonstrate that he had reasonable grounds for believing in the guilt.

3. Section 98 (4) ,ERA :The Tribunal applied this section to the relevant findings of fact, namely:-

"the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

In making this determination by applying s 98 (4), ERA, the Tribunal had in mind the essence of the test to be applied; namely, it is not what the Tribunal believes to be reasonable or unreasonable, but the test is whether the Respondent acted within the band of reasonable responses: Iceland Frozen Foods v Jones ([1982], IRLR, 439, EAT), London Ambulance Service NHS Trust v Small ([2009] IRLR 563 CA) and Sarkar v West London Mental health NHS Trust ([2010] IRLR 508).

4. ACAS Code of Practice: Disciplinary and Grievance Procedures 2015: The compliance with this was considered.

F: CONCLUSIONS

1. Was there a potentially fair reason for the Claimant's dismissal (the Respondent relies on conduct)? Under the law, both are potentially fair reasons for dismissal.

The Respondent relied upon conduct which is a potentially fair reason under law. I conclude that the Respondent satisfied the burden of demonstrating that the dismissal was for conduct.

2. Burchell Test

2.1 Did the Respondent hold a genuine belief in the Claimant's gross misconduct?

Yes. The dismissal was not predetermined but a response to the alleged slapping incident.

2.2 Did the Respondent have reasonable grounds for that belief?

Yes the statements obtained in the investigation gave Mr Chirdaris reasonable grounds for his belief that the Claimant had committed an act of gross misconduct

2.3 Was the Respondent's belief based on a reasonable investigation?

I conclude that the investigation was a reasonable one. Specifically, the investigation was not flawed by reason of those who may have been present, not being interviewed on the basis that the managers who worked in close proximity with them had made an assessment that they would not be capable of giving evidence.

3. Was the Respondent's decision to dismiss the Claimant within the band of reasonable responses available to the Respondent?

The Claimant alleged that the decision to dismiss was premeditated and biased.

I conclude that it was not premeditated and that the reason for the dismissal was that incident of the Claimant slapping Pascal, which Mr. Chirdaris, the disciplinary officer, and Ms. Largin, the appeal officer, concluded had taken place. I have concluded that the decision to dismiss was reasonable considering the nature of the Respondent organization namely to support people with learning difficulties

4. Procedure

4.1: Did the Respondent follow a fair procedure in taking the decision to dismiss the Claimant? Did the Respondent comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures?

Reviewing the procedure holistically, I found it to be a fair and reasonable one and compliant with the ACAS code of practice

5. Contributory conduct

If it is found that the Claimant had been unfairly dismissed, did the Claimant contribute to his dismissal by any culpable conduct? If so, by what proportion should the compensation award be reduced as a result?

If my conclusion is found to be wrong and that the dismissal was unfair then having reviewed in detail the evidence presented to me I would find that the Claimant contributed 100% to her dismissal and therefore any compensation awarded should be reduced to nil.

It is for the aforementioned reasons that I reached my conclusions and made my determination that the dismissal was a fair one

G: COSTS

After I had given my judgement with reason dismissing the Claimant's claim, an application was made for costs by Ms George on behalf of the Respondent in the sum of £5, 894+ VAT.

This was for costs incurred after 12 o'clock on 6 March 2020 when the Respondent's final without prejudice offer expired.

The cost application was made pursuant to rule 76 (1) (a) , Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the grounds that the Claimant had acted unreasonably in bringing the proceedings.

Ms George submitted that it was unreasonable for the Claimant to pursue a claim seeking to recover the sum of £66, 5 22. 80, a sum which took no account of the statutory cap. She also had made a claim for redundancy pay which cannot be claimed in any event as this was not a redundancy situation. When questioning the Claimant under oath, she confirmed that this was not a redundancy situation.

Prior to determining whether or not to exercise my discretion to grant the application for costs, I heard evidence from both the Claimant and her husband in relation to their means and in granting this application , I took account of the Claimant's means and those of her husband . I also gave the Claimant an opportunity to explain why the Respondent's offer was rejected. It was the Claimant's evidence that she had been badly treated by the Respondent having worked for them for 15 years and had pursued the claim to assist others.

The Respondent's application for costs is granted. I order that the sum of £200 plus VAT be paid by the Claimant to the Respondent as a contribution to the Respondent's costs.

I have decided to exercise my discretion to grant the cost application albeit a modest sum when compared with the sum actually claimed by the Respondent for the following reasons:-

1. The Claimant was legally advised from June 2019 and therefore should have known that the sum she was claiming was wholly unrealistic;
2. She acknowledged herself that this was not a redundancy situation yet still sought to recover just under £16,000 for this ground.; and
3. Several attempts to settle this matter were made by the Respondent all of which had been rejected by the Claimant.

The above matters have led me to decide that the Claimant was unreasonable in pursuing the claim.

The sum which I order be paid is a modest sum as I have taken account of the Claimant's financial position, her outgoings and liabilities and the fact that she is unemployed.

I have made the award however exercising my discretion and applying the overriding objective. The Claimant acted unreasonably in pursuing the claim and the Respondent should be compensated for this, however modestly.

Employment Judge Sharma

.....14 June 2020.....

Date Reasons Signed

15 June 2020

Date Reasons Sent to the Parties