EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104155/2018

Held in Glasgow on 26 September 2019

Employment Judge M Kearns

Ms A Hamilton	**Claimant** **Represented by:** **Ms A Bowman - Solicitor**
Mr G Climie	**Respondent** **Represented by:** **Mr W Lane - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal was to dismiss the claim.

REASONS

1. The claimant who is aged 63 years was employed by the respondent as a personal carer from 26 June 2002. It is not in dispute that she was dismissed from this employment, but the date and manner of dismissal are disputed. On 19 April 2018, having complied with the early conciliation requirements, the claimant presented a claim to the Employment Tribunal in which she claimed unfair dismissal.

Issues

2. The respondent admitted dismissal. The issues for the tribunal were:-

   (i) Whether or not the respondent's dismissal of the claimant was fair;

(ii) If it was unfair, the percentage or other chance a fair procedure would have reached the same result;

(iii) Whether the claimant contributed to her own dismissal to any extent; and

(iv) Remedy if appropriate.

Privacy

3. At the outset of the hearing I asked Mr Lane whether, in view of his disability, the respondent wished to make any application under Rule 50 in relation to the public disclosure of any aspect of the proceedings. Mr Lane did not consider an application necessary at that stage, but confirmed that if it appeared necessary to go into a level of detail where he felt Rule 50 was engaged then he would make the necessary application.

Evidence

4. A number of case management preliminary hearings took place in this case to consider the question of what reasonable adjustments were required to enable the respondent to participate. The respondent is tetraplegic and has suffered a serious brain injury. The key issues identified were: mobility; the difficulty he would have in travelling to a hearing centre and his tendency to become agitated when giving evidence such that his instructions and answers might not be coherent. Parties were all agreed that the evidence in chief of all witnesses, including the respondent, could be given in written witness statements rather than orally. However, the respondent further requested that, by way of an adjustment, his cross examination should be conducted in the form of written questions and answers. Having heard argument from parties on the matter at a telephone preliminary hearing on 31 July 2019 and having considered medical evidence and consulted the Equal Treatment Bench Book, Employment Judge Whitcombe gave the respondent two options, while making the implications of each clear to him:-

Option 1 – Written cross examination

5. In relation to this option, the Employment Judge stated:-

> *"10 If he wishes, then cross examination of him can take place in writing. However, I need to make one thing very clear. If the respondent chooses that option then, as the claimant made clear at this hearing, submissions are very likely to be made that the answers given should carry significantly less weight than if they had been given orally. This is of course the case in which there are only two witnesses to a critical conversation: the claimant and the respondent. It is entirely possible that the Tribunal might decide to give significantly less [weight] to answers given in cross examination if they are given in written form. There are many reasons for that, including greater time to prepare and the possibility that other individuals might have discussed the respondent's answers and influenced them. It would be impossible to tell. The respondent will need to weigh up the pros and cons of being cross examined in that manner."*

Option 2 – Oral cross examination with supportive adjustments

6. Option 2 was said to be oral cross examination with supportive adjustments. A number of proposed adjustments were set out in the paragraph that followed.

7. Having been made fully aware of the implications, the respondent nevertheless opted for cross examination by written questions and answers.

8. The parties lodged a joint bundle of documents ("J") and referred to them by page number. The tribunal heard evidence from the claimant. A short piece of video evidence was also lodged on behalf of the respondent.

Findings in fact

9. The following facts were admitted or found to be proved:-

   (i) The respondent sustained a head injury in or around 1991/1992 following a serious assault. As a consequence, he is tetraplegic and

requires the daily services of a personal carer to get him up and dressed, prepare and cut up his food, administer his medication, take him to the toilet and get him ready for and into bed. He uses a mobility chair to move around. The claimant was employed by the respondent as his primary personal carer from 26 June 2002 until the date of her dismissal.

(ii) The claimant's normal hours of work were 8am to 9pm Monday to Friday and 3pm to 9pm on Sundays. Most days she took a one-hour lunch break. Any days and shifts not covered by the claimant were covered by an agency called 'Home Care by Hera'. The agency was run by Patricia Morgan.

(iii) The claimant's role involved all aspects of personal care including preparing meals, administering medication, assisting the respondent with intimate personal care, shopping and cleaning. The claimant's place of work was the respondent's home. The relationship between the respondent and his carer required him to have absolute trust and confidence in them.

(iv) Due to his head injury, the respondent is occasionally aggressive. He sometimes swears. The respondent had on occasion tried to charge at the claimant in his mobility chair and sometimes referred to the claimant as his "serf". The claimant and the respondent often argued and in doing so both used 'robust industrial language'. The respondent had on occasions threatened the claimant with dismissal in the heat of the moment during arguments.

(v) On Sunday 12 November 2017, the claimant arrived for her shift. She was scheduled to work from 3pm to 9pm on that date. Not long after the claimant's shift had started, the respondent asked her to get a brown watch from his safe. The claimant was the only person with the access code to the safe. The claimant went to the safe, took out the two black watches that were there and brought them to the respondent. The respondent told her that there was a brown watch in

the hatbox in his cupboard. He asked her to go and retrieve it as he had wanted to gift it to his solicitor, Mr Briggs. The claimant told the respondent that he had already tried to give the brown watch to Mr Briggs but that Mr Briggs had refused it, so he had given it to his brother for Christmas instead. At this point, the respondent called the claimant a "fucking liar" and stated that she "must have stolen it". He instructed her to put everything back in the safe and to "get the fuck out of my property and do not ever come back". The claimant left the respondent's home immediately. The time was around 3.45pm. The claimant was upset about the way the respondent had spoken to her.

(vi) The claimant did not make alternative arrangements for the respondent's care for the remainder of her shift. The claimant was aware that the respondent would be unable to prepare and eat food, take his medication or go to the toilet without a carer to assist him.

(vii) When the claimant left the respondent's house at 3.45pm on 12 November 2017, she went into her car and called her husband, Paul Hamilton, who advised her to contact the police. The claimant went to the police station. She was very worried that she had been falsely accused of stealing. The respondent had not reported the alleged theft to the police himself. The police told the claimant not to worry about it and that no crime had been committed. The next day, Monday 13 November 2017, the claimant went to her GP complaining of low back pain and sciatica. She asked for a sick note and was signed off work for 4 weeks until 12 December 2017. The claimant submitted the GP sick note (J131) to the respondent and received sick pay for the relevant period.

(viii) On 19 November 2017, the claimant wrote to the respondent in the following terms:-

"I would request a full and detailed explanation as to why you instructed me to leave your house, my workplace, and not return on 12 November 2017 at 4pm. I have also passed on concerns to Police

Scotland in relation to the accusation made by yourself accusing me of stealing a watch to the value of £700 from your home prior to or on 12 November 2017." (J47)

(ix) The letter was sent to the respondent by recorded delivery mail. The claimant also posted a copy of the letter to the respondent's solicitor (J48).

(x) On 4 December 2017, the claimant received a letter from the respondent requesting that she attend an investigation on Thursday 7 December 2017 (J50). The letter explained that the purpose of the investigation was to allow the claimant the opportunity to provide an explanation for the following matter(s) of concern:

"Failure to follow company rules and procedures namely, care standard procedures for the care, privacy, dignity and mental wellbeing of vulnerable resident's/ service users, further particulars being that it is alleged that you on Sunday, 12 November 2017 during your duty shift, failed to follow care standard procedures of a service user in that you left the service user unattended. Which resulted in no medication or food or toilet facilities for the service user. Furthermore, it is alleged that you failed in the circumstances to organise alternative care for the service user."

(xi) The letter informed the claimant that the meeting would be conducted by an HR Face 2 Face consultant from Peninsula.

(xii) The claimant called her trade union representative who told her that she should not attend the investigation meeting without him. The claimant did not attend the meeting. Patricia Morgan of Homecare by Hera was also invited to an informal fact-finding meeting on the same date as a witness.

(xiii) Notwithstanding the claimant's non-attendance at the investigation meeting, the investigation took place. The investigator was Saragh Reid of Peninsula. Jennifer Lee was present as notetaker.

Statements were taken from the respondent and Patricia Morgan (J53). The respondent told Ms Reid that he had accused the claimant of taking his watch and that things had "started escalating really bad". He said that they had had an argument, following which the claimant had stormed off. The respondent could not remember what he had said to the claimant. The respondent said that he had waited a couple of hours to see if the claimant would come back and when she did not he telephoned Mrs Morgan from Hera Homecare, who had come to cover him at around 6.30pm on 12 November 2017.

(xiv) On 8 December 2017, the respondent wrote to the claimant again (J57). The letter was drafted by the consultants on his behalf. He noted that the claimant had failed to attend the investigation hearing on 7 December 2017 or to notify him in advance of the meeting that she would not be attending. He invited her to send the HR Face 2 Face consultant written submissions in relation to the points raised or to arrange with them a time to speak over the telephone. The letter stated that the claimant would be allowed until 12pm on Wednesday 13 December 2017 to do so. The claimant did not acknowledge the letter and did not respond to the invitation to give written or oral submissions to the investigation.

(xv) On 9 December 2017, the claimant received net pay of £1,415.93 from the respondent in respect of the month of November 2017 (J128).

(xvi) On 13 December 2017, the claimant attended her GP again and was signed off sick with low back pain and sciatica until 3 January 2018 (J132). The claimant again submitted the sick note to the respondent. The claimant received payment from the respondent of £675.20 net by way of sick pay on 6 January 2018 for the month of December 2017 (J129).

(xvii) On 21 December 2017, the HR Face 2 Face consultant Ms Reid sent the respondent her investigation report (J58). The report contained her findings on the issues set out in the investigation invitation letter to

the claimant. Ms Reid's recommendation was that the claimant be invited to attend a disciplinary hearing to answer the allegations. It was recommended that she should be advised that the allegations if upheld would be considered gross misconduct which could lead to dismissal without notice.

(xviii) By letter dated 9 January 2018 (J69), the respondent wrote to the claimant a letter inviting her to a disciplinary hearing on Thursday 18 January 2018 (J69). The letter informed her that the hearing would discuss *"the following matter of concern:*

> *1 Failure to follow company rules and procedures namely, Care Standards procedures for the care privacy dignity and mental wellbeing of vulnerable resident's/ service users, further particulars being that it is alleged that you, on Sunday, 12th November 2017 during your duty shift, failed to follow care standard procedures of a service user in that you left the service user unattended. Which resulted in no medication or food or toilet facilities for the service user. Furthermore, it is alleged that you failed in the circumstances to organise alternative care for the service user."*

(xix) Enclosed with the letter were copies of the disciplinary rules and procedures of Homecare by Hera; and a copy of the HR Face 2 Face investigations report dated 21 December 2017. The letter informed the claimant that a consultant from Peninsula HR Face 2 Face would chair the hearing and conduct any further investigations before providing recommendations. It was stated that a notetaker would also be in attendance, and that the hearing would be audio recorded and a copy of the transcript made available to the claimant. The letter informed the claimant of her right to be accompanied by a fellow employee or trade union official and told her that if the allegations were found to be substantiated, they would be considered gross misconduct under the respondent's disciplinary rules and that her employment may be summarily terminated.

(xx) The claimant contacted her trade union representative, Mr Jim Winter. By letter dated 17 January 2018 (J71), Mr Winter wrote to Laura Knox of Homecare by Hera and requested a postponement of the disciplinary hearing due to the claimant being "currently unwell". The letter stated: *"We are seeking a postponement of this disciplinary hearing as Mrs Hamilton is currently unwell. She had also been out of Ayrshire at the time when both the initial letter regarding the investigation and the letter of 9th January were sent, therefore has just received notice of the meeting, leaving no time to arrange representation from her Union."* The letter requested Ms Knox to contact Mr Winter's secretary in order to arrange a suitable date for him to accompany the claimant to her disciplinary hearing.

(xxi) Following this communication, the respondent wrote to the claimant a letter dated 22 January 2018 (J75) rescheduling the disciplinary hearing to Thursday 25 January 2018 at 11am. The letter again advised the claimant of her right to be accompanied. The letter also stated: *"You are expected to make every effort to attend this meeting. Therefore may I advise you that if you fail to attend the hearing, without good reason, or fail to notify us of the good reason for your non-attendance in advance of the meeting, the impartial Consultant will proceed investigating the matters of concerns in your absence. In such circumstances, the Consultant will then make their recommendations based upon the information available. Alternatively if you are unable to attend, you may provide written submissions to me. Please provide these by 12:00pm on Wednesday, 24th January 2018.*"

The letter went on to urge the claimant to attend the hearing in person "*to avoid the Consultant having to make findings without having had the benefit of speaking to you.*" The letter was posted to the claimant by recorded delivery mail on 22 January 2018 (J79).

(xxii) In addition, on 23 January 2018, the respondent's sister Shirley-Ann Climie emailed Mr Winter (J74) attaching a copy of the letter sent to

the claimant along with a copy of the investigation report. She stated *"You will note that the meeting has been re-scheduled for Thursday 25 January at 11am at the offices of Hera Homecare in Ayr. I understand you will be in attendance at this meeting to support Mrs Hamilton."* The email also attached a copy of the recorded delivery receipt as proof of postage.

(xxiii) Mr Winter's secretary, Bernadette MacDonald, responded to Ms Climie's email by email dated 24 January 2018 (J80). In that email, Ms MacDonald stated:

"Dear Shirley-Ann

Unfortunately Jim Winter is currently on annual leave, his first available date to attend a meeting with Mrs Hamilton would be Monday 5th February at 2pm. I would be grateful if you could confirm if this date would be suitable and I will confirm in his diary."

(xxiv) The disciplinary hearing report states that Ms Climie responded to Mr Winter's secretary in the following terms (J84):

"Dear Bernadette,

I am writing to inform you that we have already rescheduled the hearing once for your client and offered many alternative options for this hearing. Unfortunately, we will not be rescheduling the hearing as requested and will continue tomorrow at 11am. I would therefore suggest that your client looks to gain alternative representation if the trade union representative is unavailable at this time."

(xxv) The claimant did not attend the disciplinary hearing on 25 January 2018 because Mr Winter was not available to accompany her. However, she also did not contact the consultant or call the number provided for the claimant's sister in the respondent's letter of 22 January (J76). She did not advise the respondent's representatives that she was unable to attend the hearing. She did not attend, nor did she provide written submissions.

(xxvi) The appointed HR Face 2 Face consultant, Lucy Crossley attended the premises of Homecare by Hera to conduct the disciplinary hearing on 25 January. When the claimant did not turn up Ms Crossley decided to go ahead in her absence.

(xxvii) Ms Crossley considered the HR Face 2 Face investigation report dated 21 December 2017. On the evidence before her Ms Crossley made the following findings: She found that on 12 November 2017, the claimant and the respondent had had an argument about one of the respondent's watches. The respondent had made an allegation that the claimant had stolen his watch and "*as a result AH stormed off and left GC unattended in the premises*." Ms Crossley stated that she understood the respondent had then called Patricia Morgan of Homecare by Hera and had told her that the claimant had left him unattended. Ms Morgan had confirmed to the investigator that she had received a call from the respondent at approximately 5.20pm in which he had stated that he and the claimant had fallen out and that the claimant had 'stormed out'. Ms Morgan had then attended the respondent's home herself and had found him upset and urgently requiring the toilet. She had stayed with the respondent until 9pm and assisted him back to bed using the hoist. Ms Morgan had told the investigation meeting that no contact had been received from the claimant at all that afternoon and evening following her leaving the respondent unattended. The respondent had told her that he had waited approximately 3 hours before calling Patricia Morgan because he was hoping that the claimant would return to provide his care. He had told Ms Morgan that the claimant had walked out on him before but on other occasions she had always returned to continue providing care to him. The respondent told Ms Morgan that as a result of the claimant walking out, he had not received his night-time medication, had not had an evening meal and had been unable to use the toilet facilities. The respondent told the investigation meeting that he was "*unable to take anymore of this behaviour. He expressed for his own safety that he does not want AH to return to providing his care and he*

believed that the relationship with AH was finished and completely broken down."

(xxviii) At the end of the hearing, Ms Crossley reached the following conclusions on the evidence –

"17. LCR finds based on the evidence present that there has been a fundamental breach, the appropriate sanction is summary dismissal, and this is LCR's recommendation.

18. LCR finds that AH's contract of employment explicitly outlines AH's role as "personal assistant" and duties may include personal tasks, certain domestic tasks, escort duties and other tasks as directed by the Employer of Mr Climie. [sic]

19 LCR finds it to be totally unacceptable for AH to walk out on her duties to GC, a vulnerable adult. As a personal assistant, it is AH's responsibility to ensure GC receives his medication, is fed and is able to use toilet facilities. Failing to provide this care is a fundamental breach of AH's employment and as outlined in the contract of employment, accounts to serious disregard if safety regulations [sic]

….

21 LCR also finds that due to the nature of AH's work, a trusting relationship is required between both the Employer and Employee. LCR finds that GC no longer has trust or confidence in AH's ability to provide his care and the relationship has deteriorated to such a point where the Employer no longer wants AH to continue providing his care. This is evident from GC's statement during the investigation process. "

(xxix) Ms Crossley (LCR) concluded that the relationship between the respondent and claimant had irretrievably broken down and that the respondent was no longer comfortable receiving care from the claimant. Ms Crossley recommended that the allegation against the

claimant in the disciplinary letter be upheld as gross misconduct. She also recommended that consideration be given to dismissal. She stated that if the offence was found to be one of gross misconduct as defined explicitly on page 4 of the claimant's contract of employment then the claimant would be summarily dismissed.

(xxx) Ms Crossley's disciplinary report was sent to the respondent on or about 31 January 2018. The respondent read the report and decided that he agreed with its recommendations. He decided to dismiss the claimant on that basis. His reasons were that although he had had many arguments with the claimant over the years and although she had left him alone before, he had had enough. He could not tolerate it anymore. He no longer felt safe and did not have any trust and confidence in her anymore. He considered that the claimant was coming into his house and basically doing what she wanted, eating all his food, bringing her washing, along with her granddaughter's washing, abusing his home, watching his TV and taking over his house. He had filmed the claimant on his phone on Friday 10 November 2017 and when he showed the video to his family, they thought the claimant was being abusive to him.

(xxxi) The background to the video was that on Friday 10 November 2017, the claimant had told the respondent that she would be caring for her grandchildren and may have to cut her hours. However, she told the respondent that she would make sure that he had cover. After the claimant had told the respondent about this, the respondent became angry and, in particular, he spoke disrespectfully about the claimant's grandchildren. The claimant became extremely angry with him and she shouted at him for several minutes. The respondent recorded part of the episode on his phone. The respondent had, on occasion, referred to the claimant as his "serf". However, when he was rude to the claimant about her grandchildren, she shouted and swore at him and said that she would rather get a job elsewhere than listen to him any longer.

(xxxii) The claimant and the respondent had frequent heated exchanges and often swore at each in the manner shown on the video. The respondent had had a number of carers over the years and was difficult to work with.

(xxxiii) On 2 February 2018, the respondent wrote to the claimant (J88a). The letter stated: *"further to the disciplinary hearing held on Thursday 25 January 2018 I am writing to inform you of my decision. The matters of concern were:*

- *Failure to follow company rules and procedures namely, Care Standards procedures for the care, privacy, dignity and mental wellbeing of vulnerable residents/ service users, further particulars being that it is alleged that you, on Sunday 12 November 2017, during your duty shift, failed to follow care standard procedures of the service user in that you left the service user unattended which resulted in no medication or food or toilet facilities for the service user. Furthermore, it is alleged that you failed in the circumstances to organise alternative care for the service user.*

- *You failed to attend the hearing, which was organised with an impartial party. They have done a full investigation and report based on the evidence that has been provided to you.*

Having carefully reviewed the circumstances and report drafted by this impartial party, I have decided that your conduct has resulted in a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship, to which summary dismissal is the appropriate sanction. I have referred to our standard disciplinary procedure when making this decision, which does not permit recourse to a lesser disciplinary sanction.

You are therefore dismissed with immediate effect. You are not entitled to notice or pay in lieu of notice."

(xxxiv) The letter informed the claimant of a right of appeal to Shirley-Ann Climie by writing to her within 5 days of receipt of the letter.

(xxxv) On 3 February 2018, the claimant received the sum of £410.94 net in payment of statutory sick pay for the month of January 2018 (J130).

(xxxvi) By letter dated 13 February 2018, the claimant wrote a letter of appeal to Shirley-Ann Climie (J89). The letter stated that the claimant had been unfit to attend the disciplinary hearing of 25 January 2018 and that the grounds for her appeal were as follows:

"A) The severity of the sanction as this is the second occasion that your brother has dismissed me, the first time being 12 November 2017, also not following proper procedure.

B) That you failed to supply on request a copy of the company procedures and disciplinary policy (letter of 18 January 2018)."

(xxxvii) An appeal hearing was fixed to take place before an HR Face 2 Face consultant from Peninsula on Friday 9 March at 11am. The claimant attended along with her union representative Mr Winter. The HR Face 2 Face consultant chairing the appeal was Rachel Waugh. Jennifer Lee, STS Advisor from AILN (Ayrshire Independent Living Network) attended as note taker. A Minute was taken (J96). The hearing began at 11.02 and ended at 11.25. During the course of the hearing, the claimant relayed the events of 12 November 2017 to Ms Waugh. She explained that the respondent had told her to get out of the house and she did not want to go back because she 'did not want to be challenging him anymore'. She stated that the respondent would run over her with the wheelchair and that she was frightened of him. The claimant explained that she did not accept that the Hera care standards applied in relation to the respondent because she did not work for the company and was employed through the respondent's solicitor as a private carer. She stated that every Sunday when she would go into the respondent's home at 3 o'clock, she was sent straight back out to do his shopping and did not return until 5.30pm.

She stated that after the respondent had told him to get out and not come back, he had not tried to contact her or telephone her. The claimant told Ms Waugh that the respondent described her as his "serf".

(xxxviii) The claimant also stated that she had not been able to get in touch with Face 2 Face because she was not on the internet and that 'everything had just gone ahead without her knowing'.

(xxxix) After the appeal hearing, Ms Waugh made a number of findings. She concluded at paragraph 17 of her report that *"both parties believed that the employment relationship was at an end on 12 November 2017. AH failed to continue with her duties from this date, she failed to attend work or to contact GC, she moved away from the area, and she and JW expressed surprise when she was invited to attend an investigation hearing and subsequent disciplinary hearing which she failed to attend in any event."* She concluded at paragraph 18 of her report that: "*In light of this, the termination of AH's employment was confirmed to her on or around 18 January 2018. In the appeal hearing, AH and JW merely stated the sanction was too harsh…"* The appeal report was confusing and contained factual mistakes, including the date when the termination of the claimant's employment was confirmed to her and the nature of the misconduct for which she was dismissed.

(xl) Ms Waugh concluded that "in light of the submissions made by AH and JW, I can find no reason that would enable me to overturn the original finding and on that basis I do not uphold this ground of appeal." Ms Waugh did not uphold the second ground of appeal either (failure to supply on request a copy of the company procedures and disciplinary policy). Her recommendation was that the disciplinary appeal be dismissed in its entirety and the original sanction of gross misconduct be upheld.

(xli) By letter dated 22 March 2018 (J117), the respondent wrote to the claimant advising her that her appeal had been dismissed for the following reasons:

"

- *It is clear that the dismissal was based on the fact that you left me unattended and vulnerable with no medication, food or toilet facilities. This is clearly considered gross misconduct and therefore a summary dismissal would be the appropriate outcome for this matter.*

- *You agreed that you had received your contract dated 28 September 2008 which highlight the disciplinary procedures you are stating you did not receive."*

(xlii) The respondent's letter to the claimant advised her that the decision was now final.

Observations on the evidence

10. Very little of the relevant material evidence in this case was in dispute. The respondent accepted that on 12 November 2017, he probably had said to the claimant to get "get the fuck out of his house and not come back". His position in cross examination was that this had happened on many occasions and that after a period of several hours, the claimant would return and resume normality. The respondent's position in his evidence in chief was that:

"27 Ann should have worked at 9am the following day, Monday 13 [November] 2017. It is not true that she made contact that day as she alleges (page 100).

28 There was no contact from Ann until Tuesday 14 November when she telephoned my landline early in the morning, around 0830am. When I answered the phone, "am I coming in today or what?", or words to that effect. I hung up the telephone because I was upset after how she had left me on Sunday."

11. The claimant's evidence (at paragraph 29 of her witness statement) as to what had taken place in the immediate aftermath of the respondent's instruction to her to leave his house on 12 November was that:

"On Monday 13 November 2017, I attended Mr Climie's house to collect a Betty Boop ornament I had had delivered to his home. I often received parcels from his home as I was there during the day when deliveries would take place. I arrived around 1500 hours. I did not go inside. I was greeted by a home carer called Laura. Laura gave me a hug. Laura advised that Mr Climie said that there was a cowboy hat, a racing jacket and a pressure cooker that belonged to me in the house. None of these possessions were mine and I refused to accept them. I collected the Betty Boop ornament and left."

12. Unfortunately, this was not put to the respondent. No criticism of Ms Bowman is intended. The circumstances of the cross examination would have made this difficult. The respondent was not present at the hearing and the cross-examination questions had been sent to him in advance and answered in writing. However, in the absence of this evidence being put to the respondent, I am not prepared to accept the claimant's evidence on this point.

13. Paragraph 28 of the respondent's witness statement was put to the claimant in cross examination by Mr Lane. Her response was that she had never phoned the respondent's house after 12 November 2017. She disputed that she had telephoned the respondent. On balance, I accepted the claimant's evidence on this point and found accordingly.

14. Apart from these issues, in most other material respects, there was little difference between the parties on the relevant evidence.

Applicable law

15. Section 98 of the Employment Rights Act 1996 indicates how a tribunal should approach the question of whether a dismissal is fair. There are two stages. The first stage is for the employer to show the reason for the dismissal and that it is a potentially fair reason. A reason relating to the conduct of the employee is a potentially fair reason under section 98 (2).

16. To establish that a dismissal was on the grounds of conduct, the employer must show that the person who made the decision to dismiss the claimant believed that she was guilty of misconduct. Thereafter, the employment tribunal must be satisfied that there were reasonable grounds for that belief and that at the time the dismissing officer reached that belief on those grounds the respondent had conducted an investigation that was within the range of reasonable investigations a reasonable employer might have conducted in the circumstances. The onus is neutral in relation to the issue of the grounds for the respondent's belief and the sufficiency of the investigation.

17. If the employer is successful in establishing the reason, the tribunal must then move on to the second stage and apply section 98 (4) which provides:

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

(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 face."

18. In applying that section, the tribunal must consider whether the procedure used by the respondent in coming to its decision was within the range of reasonable procedures a reasonable employer might have used.

19. Finally, the tribunal must consider whether dismissal as a sanction was within the band of reasonable responses a reasonable employer might have adopted to the conduct in question. The employment tribunal is not permitted to substitute its view on any of these issues for that of the employer. Instead it must consider whether the process and decisions of the respondent fell within the range of a reasonable employer.

Discussion and Decision

20. The first issue to consider is when and how the dismissal was effected. The claimant's primary submission was that she was dismissed unfairly on 12 November 2017. However, her alternative case was that she was unfairly dismissed on 2 February 2018.

21. The respondent's submission was that the claimant was not dismissed on 12 November 2017, but was instead summarily dismissed on 2 February 2018 following an investigation and disciplinary hearing. Mr Lane referred to Mitie Security (London) Limited v Ibrahim UKEAT/0067/10, in which the EAT held that notice of termination is not effective until it is actually given and effectively communicated to the employee. He also drew my attention to Sothern v Franks Charlesly & Co Limited [1981] IRLR278 in which the Court of Appeal held (in the context of an employee's resignation) that, due to being made in the heat of the moment, an otherwise clear and unambiguous notice of termination may not be relied upon as terminating the employment relationship.

22. It was Mr Lane's contention that the exchange on 12 November 2017 did not constitute the respondent dismissing the claimant. He stated that the comment "get the fuck out of my house and do not come back" was not, in context, a clear and unambiguous statement that the employment relationship was being terminated. Mr Lane submitted that the claimant's actions on and after 12 November 2017 were not consistent with the proposition that she understood herself to have been dismissed. In particular, Mr Lane pointed out that the claimant's letter of 19 November 2017 (J47) does not contain any statement that she has been dismissed. Furthermore, the claimant submitted fit notes to the respondent (J131 and J132) on 13 November 2017 for the period to 12 December 2017 and on 13 December 2017 for the period from 4 December 2017 to 3 January 2018. The claimant's fit notes refer to low back pain and sciatica as the reason for her absence from work.

23. In my view the claimant may well have been entitled to regard herself as dismissed on 12 November 2017 or to have resigned in response to the

respondent's conduct and then to have claimed constructive dismissal. However, she did not in fact do either. I agree with Mr Lane that the actions of both parties after that date suggest that they both viewed the employment relationship as continuing and are inconsistent with dismissal having occurred on 12 November 2017. The claimant was off sick for a reason apparently unrelated to the incident on 12 November and she explained her absence by sending in sick lines. As Mr Lane points out, she continued to accept her pay from or on behalf of the respondent without querying why it was continuing (J127 to J130). She also failed to query why she had not received either written confirmation of dismissal or a P45. Although she did appeal the dismissal on 2 February, she did not lodge an appeal against the alleged dismissal on 12 November.

24. Mr Lane submits that the claimant did not suggest that she had been dismissed on 12 November 2017 until her appeal letter dated 13 February 2018, despite receiving numerous items of correspondence demonstrating that the respondent considered the employment relationship to be continuing. Mr Lane points to the claimant's appeal letter dated 13 February 2018 (J89) in support of this argument. He also referred to the claimant and respondent's previous history of having heated exchanges with each other (as evidenced in the video recording); the claimant not interpreting any of those previous heated exchanges as constituting dismissal; the claimant stating during the appeal meeting that *"on November I just wasnae going to go back because I just didn't want to be challenging Gary with anymore"* (J98); the claimant stating during the appeal meeting that *"he obviously phoned me and told me to come back"* (J101); and the claimant stating during the appeal meeting that *"I am actually contracted through South Ayrshire Council… They pay my wages so Gary really didnae have the right to sack me."* (J102).

25. Taking account of all the facts set out above - especially the claimant sending the respondent or his representatives sick lines after 12 November 2017 in expectation of payment and the fact that she was paid her salary or statutory sick pay until around 2 February – I have concluded that the employment contract continued after 12 November 2017 and that the dismissal took place

on 2 February 2018 following the disciplinary hearing on 25 January 2018 which the claimant failed to attend.

26. I then turned to consider the dismissal itself. Both Ms Bowman and Mr Lane reminded me of the test in British Home Stores v Burchell [1980] ICR 303. The respondent requires to show that he genuinely believed the claimant was guilty of misconduct. Thereafter, the Tribunal must be satisfied that he had reasonable grounds for the belief; and that at the time he formed that belief on those grounds he had carried out as much investigation as was reasonable in the circumstances. Finally, dismissal as a sanction must be within the band of reasonable responses a reasonable employer might have adopted.

27. The respondent bears the onus of proof in relation to showing the reason for the dismissal. The reason asserted in this case was misconduct. Put shortly, the misconduct in question was stated to be that during her duty shift on Sunday 12 November 2017, the claimant had failed to follow care standard procedures for a service user by leaving him unattended, resulting in him going without medication, food and toilet facilities. She was also said to have failed to organise alternative care for the service user. It was not in dispute that the claimant had left the respondent's home at around 3.45pm on the date in question on his instructions. The claimant accepted in cross examination that the respondent needed her to prepare his food, administer his medication and assist him in the toilet. She accepted that it was a relationship that required the respondent to have absolute trust and confidence in her. The claimant also accepted that she and the respondent frequently had exchanges that were heated on both sides. In view of all the foregoing facts, I accepted that the respondent had a genuine belief in the claimant's misconduct as alleged and that there were reasonable grounds for his belief.

28. Turning to the question of whether, when he formed that belief on those grounds he had carried out sufficient investigation, I concluded that the investigation conducted by Ms Reid on the respondent's behalf was within the range of reasonable investigations a reasonable employer might have conducted in the circumstances. Statements were taken from the respondent

and Patricia Morgan (J53). The claimant was invited to participate but did not do so. She was thereafter invited to send the investigating consultant written submissions in relation to the points raised or to arrange with them a time to speak over the telephone. However, she chose not to.

29. With regard to procedural fairness Mr Lane referred me to Taylor v OCS Group Ltd [2006] ICR 1602 in paragraph 47 of which the Court said this about how the Employment Tribunal should apply the statutory test: *"they should consider the fairness of the whole disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage."* Applying that test, it appeared to me that in relation to the dismissal on 2 February 2018, the claimant had been advised of the case against her and had been given an opportunity to state her case. I do accept the submission of Ms Bowman that the Appeals Officer appeared somewhat confused, both in relation to the reason for dismissal and the date when the dismissal occurred and that this was a significant flaw in the proceedings. However, the appeal outcome letter (117) is correct about the original reason for dismissal, so that whatever the shortcomings by the appeal consultant, the correct question was ultimately asked. Taking the whole procedure in the round I concluded that the overall process was fair despite this deficiency.

30. I turned to consider whether in the circumstances, (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating the reason as sufficient for dismissing the claimant. The respondent conceded in his evidence in chief that he had accused the claimant of having stolen his watch, having possibly called her a "fucking liar" and having possibly told her to "get the fuck out of my house and not come back". Clearly, that sort of behaviour creates a very difficult working

environment for a carer, though it did appear from the video that the claimant gave as good as she got and that both parties swore at each other and argued regularly.

31. On behalf of the respondent, Mr Lane drew attention to the respondent's status as an extremely vulnerable individual; the necessity of a relationship of absolute trust and confidence existing between the respondent and his carer, given his level of dependency; and the consequences of the respondent having been left alone without a carer in that he could not eat, take his medication or go to the toilet until help arrived. Mr Lane cited the case of Hutchinson v Calvert UKEAT/0205/06 in which the EAT noted that the relationship between a severely disabled individual and his carer is necessarily one of complete trust and confidence.

32. It is trite law that in considering this issue the Tribunal must not substitute its own view for that of the respondent. The test I must apply is whether the respondent's decision was within the band of reasonable responses in the circumstances. Taking all the foregoing facts into account and bearing in mind the limited size and administrative resources of the respondent as a vulnerable individual employer, I have concluded that dismissal was within the band of reasonable responses of a reasonable employer in the circumstances.

33. It follows that the claim does not succeed and is dismissed.

Employment Judge: M Kearns

Date of Judgement: 22 November 2019

Entered in Register,

Copied to Parties: 25 November 2019