



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107743/2019

5 **Held in Glasgow on 22 October 2019 and 26 and 27 February 2020**

Employment Judge: M Mellish

10 **Mrs T Bradley**

**Claimant
In Person**

15 **Alpha Care Management Services Limited
t/a Carnbroe Care Group**

**Respondent
Represented by:
Mr N McDougall –
Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The judgment of the Tribunal is that the claimant was fairly dismissed from her employment with the respondent.

The claimant's claim for unlawful deduction from wages was time barred and is dismissed.

REASONS

25 **Introduction**

1. The claimant submitted complaints of unfair dismissal and unlawful deduction from wages.
2. Originally, the claimant also sought an award in relation to holiday pay and what were described as unpaid shifts. However, this matter was resolved
30 between the parties on the basis that the respondent accepted that the claimant was owed £323.75 (gross). The latter figure is made up of 7 hours holiday pay and 30 hours of unpaid shifts. The respondent indicated that it would make payment of the said sum without the need for an order to be made by the Tribunal.

3. It was conceded on behalf of the respondent that the claimant had been dismissed. The claimant made it clear that, if successful, she sought compensation only, by way of remedy.
4. At the commencement of the hearing, the Tribunal considered the issue of whether, if there was a need to consider remedies, the Tribunal should look at a separate hearing. The matter was raised by the respondent's representative. The claimant indicated her agreement to the respondent's suggestion. The Tribunal decided that remedies should be severed and dealt with in a separate Hearing, if necessary.
5. The case was originally listed for a one day hearing in October 2019. It was, however, necessary for the case to be continued to 26 and 27 February 2020 to hear the remainder of the evidence. At the conclusion of the hearing on 27 February, it was agreed that it would be appropriate for the parties to file written closing submissions by 30 March 2020. Directions were made accordingly.
6. Evidence was led for the respondents from Mr Sam Jamieson (Nursing General Manager). The claimant gave evidence on her own behalf.
7. On the second day of the Hearing, the claimant made an application for a Witness Order, in respect of Ms Sharon McGowan (Area Manager; until 10 February 2020, when she left the respondents and commenced employment with another company). Having heard and balanced the respondent's arguments against the claimant's, the Tribunal decided that the application should be granted. Ms McGowan attended the Tribunal on the final day of the hearing in response to the Witness Order. The respondent's representative offered to examine the witness in chief so that the claimant could follow with cross examination. Although Ms McGowan was technically the claimant's witness, the Tribunal decided that this was a pragmatic way to proceed. The offer had been made by the respondent's professional representative and could only assist the claimant to present her case.
8. Various Bundles of Productions were lodged with the Tribunal. The following were lodged on 22 October 2019: (i) a respondent's bundle numbered from

pages 1 to 96; (ii) a claimant's bundle numbered from pages 97 to 204C. The respondent's representative also provided a copy of the claimant's contract of employment. On 26 February 2020, the respondent lodged an additional bundle entitled "Index of Documents 2". However, given the Tribunal's decision in relation to the unlawful deduction from wages claim, that bundle was in effect redundant and it was no longer necessary to refer to it. The respondent's representative provided the Tribunal with a "Cast List". On 26 February 2020, the claimant also filed an additional bundle; in effect this was simply to add pages 205 to 244 to her original bundle.

9. On the second day of the Hearing, the respondent made an application in relation to the claim for unlawful deduction from wages, saying that it was out of time. The Tribunal was asked to consider that jurisdictional issue as a preliminary point and agreed that it was appropriate to do so. Having heard and considered the respondent's submissions against the claimant's, the Tribunal decided that the claim for unlawful deduction from wages was time barred and should be dismissed. Oral reasons were given at the hearing. In paragraph 13 below, the claimant indicates that she accepts the Employment Judge's decision in this matter; though explaining that she had originally thought that she was within the required timescales. This present judgment, therefore, deals purely with the outstanding issue of the unfair dismissal claim.

Findings of Fact

10. The Tribunal found the following facts to be admitted or proved:-

- i. The claimant worked for the respondent as an Assistant Cook at the Carnbroe Care Home in Coatbridge.
- ii. The claimant's date of birth is 28 August 1968.
- iii. The claimant commenced employment with the respondent on 12 February 2017. She was dismissed on 13 March 2019.
- iv. Carnbroe Care Home consists of four different Units; there are nursing and residential wings, together with a relatively new dementia unit. The Home has some 84 beds. Ms Lyndsey Dick is the Home Manager.

5 Around a total of 8 staff were employed to work in the kitchen. There would usually be 3 staff working on the claimant's shift; 2 Kitchen Assistants and the claimant herself. Rarely, the claimant would work with another Assistant Cook; perhaps at Christmas or when the latter was providing holiday cover.

v. The respondent's disciplinary procedure includes the following as examples of gross misconduct (page R93):

- Using the Company's property, materials or equipment to carry out work for third parties on a personal basis without permission;
- 10 • Dereliction of duty, including sleeping whilst at work and undertaking unauthorised activities during normal working hours;
- A serious breach of health and safety rules, including acts or omissions which endanger the safety of another employee, client, customer or visitor.

15 vi. The claimant was suspended on 3 January 2019, pending an investigation into matters which had arisen regarding her conduct. Ms Dick, Carnbroe Home Manager, was appointed as Investigating Officer.

vii. Ms Dick interviewed the following employees (referred to below by initials and job title) (the minutes of the meetings can be found in the bundle at
20 the pages indicated):

- TM, Care Assistant on 3 January 2019 (page R26);
- CC, Head Chef on 3 January and 7 February 2019 (pages R27 to R28 and page R48). CC also provided a statement on 27 February 2019 (page R64);
- 25 • LAA, Kitchen Assistant on 3 January 2019 (page R 29);
- MC, Care Assistant on 3 January 2019 (page R30);
- EB, Staff Nurse on 3, 9 January and 6 February 2019 (pages R31, R37 and R47);

- NM, Assistant Cook on 8, 9 January and 6 February 2019 (pages R34, R36 and R46);
 - HM, Kitchen Assistant on 9 January and 21 February 2019 (pages R35 and R61);
 - 5 • BR, Care Assistant on 13 February 2019 (pages R53 to R54);
 - IC, Administrator on 21 February 2019 (page R60).
- viii. The claimant herself was interviewed on 22 and 31 January 2019 (the minutes of the meetings appear at pages R39 to R42 and pages R43 to R45 respectively).
- 10 ix. By letter dated 5 March 2019, the claimant was invited to a disciplinary hearing (page R68) on 13 March 2019. The hearing had been arranged for two earlier dates but it had been necessary to reschedule on both occasions. The respondent's letter dated 22 February 2019 (pages R62 to R63) confirmed that the purpose of the disciplinary hearing was to
- 15 consider the following allegations:
- That on Christmas Eve, whilst on working time you cooked and sold steak pies from the premises;
 - That on Christmas Eve, whilst on working time you prepared and sold a trifle from the premises;
 - 20 • That on Christmas Eve, you used Carnbroe staff members to help you with these steak pies and trifle;
 - That on Christmas Eve, you failed to inform management of a shortage of ingredients within the kitchen;
 - That on Christmas Eve, you were cooking food and selling to staff
 - 25 without informing or obtaining permission from management;
 - That you extended your working day on Christmas Eve in order to fulfil your "orders" for these steak pies and trifle.

- 5 x. Various documents were said to be enclosed with the letter, including copies of notes of investigatory meetings and a copy of the respondent's disciplinary procedure. The letter also confirmed that, in view of the nature of the allegations, the outcome of the hearing might be dismissal on the grounds of gross misconduct.
- 10 xi. The Disciplinary Hearing took place on 13 March 2019. Mr Jamieson chaired the meeting and was accompanied by Ms Gallagher, who was present to take notes. Mr Jamieson was the manager of Craigend Gardens, another of the respondents' care homes and he had been appointed to deal with the disciplinary hearing. Typed minutes of the hearing were prepared (pages R69 to R73). The claimant attended and was accompanied by Mr Adigwe, her trade union representative.
- 15 xii. On 15 March 2019, Mr Jamieson wrote to the claimant to confirm the outcome of the disciplinary hearing (pages R74 to R75). The claimant was informed that it had been decided to dismiss her, without notice, on the grounds of gross misconduct with effect from 13 March 2019. Mr Jamieson found the allegations made against the claimant to have been substantiated. In addition, he found that the claimant's actions had put the residents of Carnbroe Care Home at risk as she had cooked and served meat from a non approved source. In the course of his reasoning, Mr Jamieson wrote "We have also carefully considered your employment as a whole and any mitigating factors, including your previous disciplinary conduct, employment position, length of service, experience and your individual circumstances, in order to consider whether a lesser sanction in place of dismissal may be appropriate, such as redeployment or a final written warning. Unfortunately, we have not been able to identify any mitigating circumstances or appropriate alternatives to dismissal".
- 20
- 25
- xiii. Finally, Mr Jamieson's letter informed the claimant that she had the right to appeal against the decision.
- 30 xiv. On 18 March 2019, the claimant wrote to the respondent (page R76) to indicate her wish to appeal. With regard to the decision to dismiss her,

the claimant stated "I feel this to be unfair as I was fulfilling my duty of care towards the residents of Carnbroe Care Home".

- xv. Ms Sharon McGowan (Area Manager) had been appointed to hear the claimant's appeal.
- 5 xvi. By letter dated 21 March 2019 (page R77), Ms McGowan wrote to the claimant to invite her to attend an appeal hearing on 28 March 2019.
- xvii. The appeal hearing took place on 28 March 2019. Ms McGowan chaired the meeting and was accompanied by a colleague, who was present to take notes. The claimant attended and was once again accompanied by
10 Mr Adigwe, her trade union representative. The handwritten notes of the hearing appear in the respondent's bundle at pages R78 to R85).
- xviii. On 2 April 2019, Ms McGowan wrote to the claimant to confirm the
15 outcome of the appeal hearing (R86 to R87). Ms McGowan informed the claimant that her appeal had been rejected. Ms McGowan set out the reasons for her decision, as follows:
- You have admitted cooking and preparing steak pies for staff on the premises on the 24.12.2018. You have admitted that you received payment for these steak pies. This is an act of gross misconduct as detailed in the disciplinary policy. This allegation is
20 upheld.
 - You have admitted preparing a trifle for a staff member on the premises on the 24.12.2018. You have admitted receiving payment for this trifle. This is an act of gross misconduct as detailed in the disciplinary policy. This allegation is upheld.
 - 25 • There is sufficient evidence to support the allegation that you enlisted the help of Carnbroe staff in the preparation of the trifle but not the steak pies. This allegation is partially upheld.
 - You failed to inform management of the shortage of ingredients in the kitchen on the 24.12.2018. The evidence supports the fact that
30 you failed to inform the Home Manager and the Head Chef of the

5 shortage of stew arising from a higher than anticipated number of residents opting for steak pie for Christmas lunch. You had the opportunity to inform both these managers on 24.12.2018. I do not accept that having a care assistant informing the administrator of this issue is sufficient. You were in charge of the kitchen that day and it was your responsibility to alert senior staff if you were unable to obtain a further delivery from the Home's approved supplier. By your own admission you also failed to contact the approved meat supplier to the Home who was still open for business on the 10 24.12.2018. This has since been verified by the supplier's Sales Manager Bruce Lorimar. As a result you brought in meat from a non approved source to resolve the shortage of stew. This is mentioned in interview statements provided to you so formed part of the process and at length during the disciplinary hearing. In 15 doing so you put a vulnerable client group at risk. This is a clear breach of food hygiene regulations for care homes. This allegation is upheld.

- 20 • You failed to obtain permission from management that you intended to cook and sell food on the premises on the 24.12.2018. This allegation is upheld.
- 25 • You did extend your working day on the 24.12.2018 as is evidenced by the T & A Records supplied to you. By your own admission you prepared a trifle and assembled 2 steak pies for staff whilst on working time. The time taken to undertake these tasks will have added to your working day. As you never made the Home Manager aware that you were preparing food for staff on working time she approved the additional time that you claimed on 24.12.2018. This allegation is upheld.

30 xix. In conclusion, Ms McGowan informed the claimant that she had now exercised her right of appeal under the respondent's disciplinary procedure and that the decision was final.

Claimant's submissions

- 5 11. The claimant made submissions, as summarised below. The authorities referred to by the claimant are set out in italics. Those employees who were interviewed by the investigating officer are either referred to by job title or by their initials.
- 10 12. The respondent dismissed the claimant on the grounds of gross misconduct. The principal reasons given by the respondent for the dismissal were: for the preparation of two steak pies and one trifle for two co-workers whilst at work and for sourcing meat from a butcher who was not pre-approved by the respondent. However, the butcher was and still is approved by Food Standards Scotland. The approval number for the said Butcher is 1214 and under Food Standards Scotland requirements, they must comply with Health and Safety regulations, including regular inspections and audits to ensure products are safe for human consumption throughout the food chain link and to guarantee traceability of the product. There were four original charges and two additional charges added at the appeal stage.
- 15 13. After submissions and consideration my claim for unlawful deductions from wages was dismissed on the basis it was time barred. Whilst I accept the Judge's impartial decision, due to my inexperience and understanding of such legal processes, I believed that I was within required timescales. The issue which requires to be decided now is my claim for unfair dismissal.
- 20 14. The grounds for my unfair dismissal claim, I believe, are clear within the ET1 form. I do not believe a fair and transparent investigation was carried out. I believe the respondent failed to follow fair procedures including those that ensure equity and impartiality. I believe they failed to take the mitigating circumstances into consideration which led them to respond outwith the band of reasonable responses.
- 25 15. My honest and transparent responses to reasons for my actions, which were predominantly to act in the best interests of everyone within Carnbroe Care Home, were not taken on board, which led to my dismissal on the grounds of gross misconduct.
- 30

16. The respondent's current operational name for the purposes of the claim was confirmed [*by the respondents*] as Alpha Care Management Services Limited.
17. I believe the respondent failed to adhere to my fundamental right not to be unfairly dismissed.
- 5 18. The respondent carried out an investigation, gathering facts from staff whose statements contradicted each other at times. The respondent failed to acknowledge this was the case. Furthermore, the respondent, during their investigations, failed to interview all staff members; see the minutes of a meeting between Ms Dick and LA (respondent's bundle, page 29). I believe
10 that, had statements been provided from staff who were omitted from the investigation, this would have played a pertinent part in supporting my case.
19. The respondent failed to take into account the mitigating factors that led to me taking the action I did, that being to ensure that residents nutritional requirements and choices were met. Nor did they acknowledge or hold the
15 Head Chef accountable for his inability to forward plan an event which comes around annually.
20. The respondent, during the course of the investigation, increased the number of allegations being brought against me from four to six. (respondent's bundle, pages 49, 86 and 87).
- 20 21. In *McMillan v Airedale NHS Foundation Trust [2014] IRLR 803 CA*, the Court of Appeal held that an employer does not have the right to increase a disciplinary sanction on appeal unless it expressly provides for this in its disciplinary procedures. The Court noted that the general understanding is that the right of appeal is conferred for employee's protection and that its
25 exercise will not leave them worse off.
22. It is my understanding that the correct way to deal with any additional disciplinary sanction is to adjourn the appeal hearing and commence a disciplinary investigation into the new allegations. If a case is found to be
30 answerable, it should result in a new disciplinary hearing being convened. I

would direct the Tribunal to *Ramphal v Department for Transport UKEAT/0352/14*. Employees should be given notice of any changes in the case to allow an opportunity to deal with it. This is something I was not afforded the opportunity to do regarding additional charges.

5 23. I would further direct the Tribunal to my union representative's comments during the appeal hearing on 28 March 2019. (respondent's bundle, page 84. Lines 7 and 8 from bottom of page).

24. The Acas Guide stresses that employers should keep an open mind when carrying out investigations and that their task is to look for evidence that supports as well as weakens the employee's case. If the disciplinary action results in dismissal and there is an indication that the employer has pre-judged the outcome, that can be enough to make a dismissal unfair.

10

25. In looking at *Sovereign Business Integration plc v Trybus EAT0107/07* the employer must look for innocence as well as guilt, establishing all facts including mitigating factors which led to the employee's conduct being in question.

15

26. The Head Chef had in previous year made things easy for himself by ordering a cooked Turkey instead of preparing a Christmas meal from scratch. I would direct you to a text sent by him notifying me that he had ordered everything correctly from the butcher. (respondent's bundle, page 51, 10 lines from bottom).

20

27. There have been conflicting statements over sufficient stocks. I would direct the Tribunal to the statement from NM, Assistant Cook (respondent's bundle, page 34, 14 lines from top). Furthermore, I would direct the Tribunal to the statement provided by BR (respondent's bundle, page 53, lines 6, 7 and 8. Also, line 19 from the bottom of the page).

25

28. *[At this point, the claimant refers the Tribunal to the minutes of the investigatory meeting with the Head Chef; in particular page 27 in the*

respondent's bundle, line 18 from the top and lines 15/16 from the bottom, together with page 28, third line from the bottom].

29. It is my belief that my dismissal was contributed to by financial difficulties within the organisation and the Head Chef was trying to deflect from his own lack of ability to run a kitchen in an efficient manner as he was trying to secure his own employment. The Head Chef, my line manager, was in agreement it was alright for staff to bring in food for residents as part of his practice; therefore why was I penalised for doing the same and acting in the best interests of the residents, who I considered my priority.
30. EB was aware of my intentions to make steak pie, albeit it was to do so in my home until mitigating factors presented themselves as a result of shortage of stew.
31. EB was interviewed on three occasions (see respondent's bundle – page 31, lines 9/10 from the top – page 37, lines 7/8 from the top – page 47, line 11 from the top). She actually supplied her own dish and agreed to source raspberries for her trifle; therefore, if I am guilty she was every bit as complicit in this situation and I would ask the question why was she not disciplined for her part in it?
32. During investigations, I raised concerns with my union representative about IC taking minutes during the investigation, due to her being a material witness, who had approached me on Christmas Eve 2018 in the kitchen, when two other staff members were present, to enquire about the shortage of food. This resulted in my union representative Mr Adigwe having to send an email to highlight to Mr Jamieson, who was carrying out the disciplinary hearing, the failures in fairness of the investigation process. (claimant's bundle, page 145).
33. IC was interviewed on 21 February 2019 by Ms Dick. During her interview she was asked if she was aware of any issues, to which IC replied 'No'. BR had notified IC of her concerns over the shortage of food for Christmas dinner on Christmas Eve. BR had been given the information by NM. (respondent's bundle, page 53, lines 6 and 11 from top and page 60, lines 3, 4 and 5 from top).

34. I would direct the Tribunal to the respondent's bundle, page 89 whereby IC clarifies that she was made aware of the shortage of food at 11.30am on the morning of 24th December. I would further direct the Tribunal to line 10 of this undated statement, whereby she comments that 'no-one' from the kitchen spoke to her regarding the shortage. There were two members of staff on, both with same remit, myself and NM; therefore, I would question the equity of this investigation as I was the only staff member held accountable for the events of that day.
35. I would like to highlight my concerns around IC being allowed to take minutes of investigative meetings when she was a material witness. IC was aware of staff's answers to questions they were being asked, before she herself was interviewed. Therefore, I ask the Tribunal to consider the fairness and equity of the whole investigation process. I believe that IC was not a credible witness.
36. Ms Dick carried out the investigation during which time she, on numerous occasions, made reference back to mediation which had taken place between the Head Chef and myself. I would question her intentions as to why she felt it relevant to raise this in an investigation meeting which resulted in my dismissal. (respondent's bundle, page 27, 6th line from top, 4th and 8th line from bottom and bottom line).
37. Furthermore, I would draw the Tribunals attention to NM's follow on statement of 9 January 2019. NM had previously, in her statement of 8 January 2019, claimed there were no issues with ordering of stock (respondent's bundle, page 36, lines 10 and 11). Due to NM's contradictory evidence, I would question her credibility as a witness. NM made a further contradiction, during her meeting of 6 February 2019, when questioned about the trifle. (respondent's bundle, page 46, line 13 from top and 6 from bottom). NM was working on Christmas Eve, was doing the same role as me and therefore I would pose the question, why did she not make attempts to remedy the shortfall in stew for dinner or contact management, as she had the same duty of care I had under SSSC codes of practice.
38. Ms Dick, I believe asked leading questions during a number of her interviews with staff (respondent's bundle – page 27, bottom line and lines 8/10/14 from

bottom – page 53, line 11 – page 34, line 11 from the top and line 7 from the bottom).

39. Ms McGowan at the time of dismissal was Regional Manager. She worked with me for over a year on a daily basis and even offered me the head chef's position. Yet when giving evidence under oath, she admitted to being unaware of how the kitchen operated and what procedures were in place for ordering or for approving a butcher. In holding such a responsible position, I believe it would have been part of her role to have policies and procedures in place, including ordering of food and how to respond in an emergency should it be necessary to order from another butcher. Ms McGowan should have had all relevant policies and procedures in place during her time as Manager of the care home; therefore her explanation for not being knowledgeable in this area is unacceptable and contributed to the position I found myself in.
40. Ms McGowan swore under oath that she had not received my evidence from Mr Jamieson. With regard to the equity of the case, I believe that my employer failed to look for my innocence, instead choosing to focus on guilt. In the interests of justice and fairness I ask that consideration is given to Ms McGowan's credibility as a witness, as there was evidence provided yet not examined as part of the appeal hearing.
41. The reasonableness test is that the Tribunal has to assess the employers conduct and whilst the respondent carried out an investigation, I do not believe it was carried out in the interests of justice and in a fair and transparent manner. There were several staff who could have been but were not interviewed. It is my belief that, had all staff been interviewed, the outcome of my case may have resulted in a different response within the range of reasonable responses.
42. I would ask the Tribunal to refer to the imbalance of workload [*Note: the claimant makes a comparison between herself and the Head Chef and refers to pages 193 to 196 in the claimant's bundle*]
43. It is my belief facts were not taken into consideration by management during the investigation and that, had a thorough investigation been carried out by

management (which would include referring to and unpicking all evidence provided by myself, including emails and texts which clearly highlighted that there was insufficient stock being ordered regularly by the Head Chef), I believe I would still be employed by Carnbroe Care Home (claimant's bundle pages 114-126).

5

44. Employers are in a position to exercise a range of 'reasonable responses' which include addressing the conduct of the employee. Based on the evidence provided and the contradictory evidence gathered from those employees who were interviewed, I believe the respondent acted outwith the band of reasonable responses; the action taken by me was not a deliberate or premeditated act to prepare steak pie or trifle on the premises of Carnbroe Care Home, or to put residents health and wellbeing at risk, but was instead as a result of mitigating factors which originated due to lack of planning by a Head Chef. It was to find a solution, whilst being duly diligent, to ensure that everyone at Carnbroe Care Home had a Christmas meal they deserved.

10

15

45. I refer the Tribunal to *Ramphal v Department for Transport UKEAT/0352/14*; the involvement of a third party can prove detrimental to the outcome of disciplinary hearings. In my case, the third party was Legal. Ms McGowan makes reference to them during my appeal hearing on 28 March 2019. (respondent's bundle, page 84). Mr Jamieson stated under oath that he was intending to apply a more reasonable response as opposed to gross misconduct.

20

46. Throughout the investigation process I remained honest, consistent and transparent, admitting to having made the two steak pies and contributing to the making of a trifle on the premises of Carnbroe Care Home. (respondent's bundle, page 41, starting 12 lines from bottom). Never was it my intention to carry out this task on the workplace premises. (respondent's bundle, page 41, 4 lines from bottom).

25

47. Ms Dick, during her fact finding investigation with me, referred to previous mediation between the Head Chef and me which totally deflected from the matter in hand. Throughout Ms Dick's investigatory meetings, it is my belief that Ms Dick gathered information which was not essential to the investigation;

30

however it was detrimental and contributory to the final decision taken by the respondents to dismiss me for gross misconduct.

48. Under the Health and Safety at Work Act 1974, all employers and employees are responsible for health and safety including their own, ensuring safety relating to work practice and environment. Ms Dick was Home Manager and as such would have been responsible for staff training regarding food hygiene.
49. I do not believe the mitigating circumstances were taken into consideration, nor was my clear record. I stand by my comment (respondent's bundle, page 17, bottom line) that I was being pushed out of my job due to restructuring.
50. I made the steak pies. However, this was not premeditated and would not have happened had there been sufficient food supplies to enable me to make residents Christmas dinner, providing them with choices as per Care Inspectorate requirements. I was asked by two of my colleagues, one of whom was a senior member of staff, to make them a steak pie. However, it was my intention to carry this task out in my own home. Due to insufficient stocks for festive meals, I improvised by using meat which I had purchased to make steak pies at home for colleagues. The meat was purchased from a registered Food Standards Scotland approved butcher, audit number 1214.
51. I had been given two day's workload in one day. I was acting in good faith, ensuring residents health and wellbeing was being addressed. There would have been insufficient food for residents had I not taken action. Had planning been adequately carried out by management, I would not have been forced to make a decision. Insufficient supplies are not isolated occurrences and it had previously been considered acceptable for staff to bring stocks in and be reimbursed for them. The other cook on shift with me failed in being proactive to find a solution.
52. The meat was purchased from a third party butcher, due to there being insufficient time and planning for the respondent's usual source. Normal practice for placing an order for butcher meat within a care home would be to order the day before. This ensures that the butcher is able to source stock and deliver on schedule to meet the needs of the client. Delivery drivers have

a schedule to follow and if orders are placed late, they would not be guaranteed.

53. Throughout my 25 months working as an assistant cook, I was a conscientious and reliable member of staff who endeavored to provide both a professional and efficient service to the residents of Carnbroe care home, always putting their wellbeing at forefront of my mind. Evidence of this can be found in my supervision minutes (claimant's bundle, pages 197 and 198).
54. My time employed by the respondent's service is sufficient in length, in conjunction with a clean disciplinary record, to effectively mitigate in relation to the acts of gross misconduct for which I was charged and dismissed.
55. I was found guilty of two charges, the first one being that I cooked steak pie on the premises of the care home and secondly sourced butcher meat from a butcher who had not been approved by Carnbroe Care Home, but who was a reputable approved butcher under Food Standards Scotland. The latter is a legal governing body which ensures butchers comply with regulations to ensure public safety. It is for this reason that, when there was a shortfall of meat to provide choice and to feed residents due to lack of forward planning by the Head Chef, I made the decision based on the short timescale I had, to take action in his absence to ensure residents were provided with both choice and a Christmas dinner that most people would expect. I was dismissed by my employer for doing this. It is submitted that I was unfairly dismissed.
56. The Tribunal is invited to make a finding that I was unfairly dismissed and to uphold my unfair dismissal claim in the interests of justice.
57. If the Tribunal finds that my dismissal was procedurally unfair, I would ask that the Tribunal deny the respondent's request to rely on *Polkey v AE Dayton Services Ltd* [1987] ICR 142 with regard to the reduction of any award of compensation.
58. If the Tribunal finds that my dismissal was unfair, the Tribunal is invited to award compensation reflective of the impact being dismissed on the grounds of gross misconduct has had on me, not only my reputation, career and the

financial worries it brought, but the impact on both my physical and mental well-being.

Submissions on behalf of the respondent

59. Authorities referred to:

- 5 • IDS Employment Law Handbooks – Vol.12 – Unfair Dismissal – 3.33,6.238;
- East of England Ambulance Service NHS Trust v Sanders EAT 0319/15.

60. Submissions were made on behalf of the respondent, as summarised below.

10 61. The claimant was dismissed following a finding of gross misconduct by the respondents. The two material conduct issues involved were: first, the preparation of two steak pies and one trifle for co-workers whilst at work; and secondly, use of meat supplied by a butcher not pre-approved by the respondents to feed residents in the care home. Following upon her dismissal
15 the claimant raised an action of unfair dismissal and unlawful deduction from wages.

62. The respondents raised the issue of a potential time bar for that part of the claim relating to an alleged unlawful deduction of wages. On the second day of the Hearing, after submissions and consideration, the part of the claim for
20 unlawful deduction of wages was struck out on the basis it was time barred. The only live issue for the Tribunal to determine is that of unfair dismissal.

63. The ground for the claim for unfair dismissal is not entirely clear from the ET1. However, it is anticipated that the claim for unfair dismissal may turn on a submission that dismissal was either procedurally unfair or outwith the band
25 of reasonable responses.

64. Another preliminary issue which arose related to the correct identity of the respondents. The respondents confirm the correct identity for the purposes of the claim is Alpha Care Management Services Limited.

65. The respondents accept that the claimant is owed £323.75 gross which is constituted by 37 hours of unpaid hours (7 hours holiday pay and 30 hours for unpaid shifts). The Respondents will make payment of these sums without the necessity of an order by the Tribunal.
- 5 66. *[Note: at this point in the submissions, the respondent's representative sets out a summary of the law relating to unfair dismissal, which need not be rehearsed here. However, particularly in the context of written submissions, the representative helpfully deals with the provisions of section 98 Employment Rights Act 1996, as well as making additional comments under*
10 *the headings "Requirement to act reasonably", "Investigation" and "Band of reasonable responses"]*.
67. This claim is slightly unusual in that the conduct which formed the basis for the finding of gross misconduct is not in dispute. In her ET1 the claimant made the proposition that 'throughout the investigation I have always been
15 honest and admitted making two staff a steak pie and one trifle on the premises' [page 17 of the respondent's bundle]. She also states that 'I was carrying out my duty of care to provide the residents with a choice of meals that the care commission says we must do. I incurred the full cost of the butcher meat and ingredients I supplied to the home over the festive period'.
- 20 68. Lyndsey Dick was the care home manager for Carnbroe Care Home at the material time and was appointed to carry out the investigation. No evidence was led about the investigation because the outcome of the investigation is not in dispute. The material findings from the investigation were that: first, the claimant did prepare two steak pies and one trifle whilst at work; and secondly,
25 the claimant used meat purchased from a third party butcher rather than one of the respondents regular approved suppliers to the care home.
69. Mr Jamieson was the care manager for the sister unit Craigend Care Home. He was appointed as the disciplinary officer given his degree of independence. He confirmed in his evidence that he received the
30 investigation report which contained interviews with the claimant and the two co-workers she made the pies and trifle for. On reviewing the evidence Mr Jamieson also identified what he described as a serious issue, being the

introduction and use of meat from a non approved source in the care home. He confirmed his belief that the conduct ultimately admitted by the claimant did constitute gross misconduct. He also confirmed that he took mitigating circumstances into account but given the seriousness of the issues dismissal was the only appropriate outcome.

5

70. The law provides that dismissal will usually be within the band of reasonable responses in instances of gross misconduct. The first issue for the Tribunal to determine is therefore whether the respondents were correct to classify the conduct admitted by the claimant as gross misconduct.

10 71. The respondent's disciplinary procedure includes the following as examples of gross misconduct [page 93 of the respondent's bundle]:

- first, 'Using the Company's property, materials or equipment to carry out work for third parties on a personal basis without permission';
- secondly, 'Dereliction of duty, including sleeping whilst at work and undertaking unauthorised activities during normal working hours'; and
- thirdly, 'A serious breach of health and safety rules...'

15

72. It is submitted that during the disciplinary process and in cross examination the claimant was evasive about the issue of when and where she made the pies and trifle. However, ultimately the claimant did accept that she made the steak pies for her co-workers in the kitchen of the care home on Christmas Eve during working hours. It is submitted that is a clear breach of the first two examples of gross misconduct noted above. The claimant sought to make the proposition that she did have permission in her evidence. The Tribunal is invited to reject that evidence as incredible.

20

25 73. There is also no dispute that the claimant brought in meat from a butcher who was not approved by the respondents. In her evidence the claimant sought to make the proposition that the respondents did not have a list of approved suppliers from whom meat had to be purchased. That is contradicted by her position in the disciplinary hearing where she recognised the requirement for regular reputable suppliers [page 70 of the respondent's bundle]. In any

30

event, Mr Jamieson was clear in his evidence of the risks such a practice does pose; particularly to the elderly individuals who inhabit the care home. It is submitted that supplying and using meat from a non-accredited source is a clear breach of the third example of gross misconduct.

5 74. For these reasons, it is submitted the respondents were correct to make a finding of gross misconduct. Given the finding of gross misconduct, dismissal will usually fall within the band of reasonable responses available to them unless this claim falls within the 'exception to the rule' category. It is submitted that there is nothing exceptional about the circumstances of the present case.

10 75. Dismissal will only be outwith the band if it is pushed out by the presence of compelling mitigating factors which have failed to be taken into account. The claimant's position may be that her conduct was mitigated by the fact it was only two steak pies and a trifle and that the butcher was reputable. However, rather than being mitigating factors it is submitted these are aggravating factors.

15

76. The claimant made the food for her co-workers on Christmas Eve. The claimant gave evidence that she already had two days worth of work to do on that day. Mr Jamieson gave evidence that was one of the busiest days of the year when all of the claimant's time should have been dedicated to her employment and providing the residents with food.

20

77. The claimant gave evidence that she supplied the meat from a third party butcher because she would not have been able to source any from the Respondents' usual source. Ms McGowan (area manager and appeal officer) gave evidence confirming that the respondents' usual supplier, Bruce Lorimar, was available on the day and could have delivered the meat [page 25 86 of the respondent's bundle].

78. Beyond these issues, the claimant had only been employed by the respondents for a period of 25 months; just one month over the minimum qualifying period. Normally, the single greatest factor in mitigation will be the claimant's length of service. That will usually be coupled with and derive significance from the presence of a clean disciplinary record. However, the

30

claimant's length of service is so short that it cannot serve to effectively mitigate against separate acts of gross misconduct.

79. The claimant is guilty of two distinct issues of conduct which either separately or together amount to gross misconduct. She was dismissed as a result. It is submitted that her dismissal was not unfair.

80. The Tribunal is invited to make a finding that the claimant was not unfairly dismissed and to dismiss the remainder of the claim.

81. If, which is denied, the Tribunal finds that the dismissal was procedurally unfair, the Tribunal is invited to rely on *Polkey v AE Dayton Services Ltd [1987] ICR 142* and to conclude the claimant would have been dismissed in any event and to reduce any award for compensation accordingly.

82. Further and in the alternative if, which is denied, the Tribunal finds that the dismissal was unfair, the Tribunal is invited to reduce any compensation awarded by 100% to reflect the Claimant's contributory conduct.

15 **Relevant Law**

83. The law relating to unfair dismissal is contained in section 98 of the Employment Rights Act 1996 ("the ERA"). It is initially for the employer to establish that the claimant was dismissed for a potentially fair reason, one of which is a reason relating to "conduct".

20 84. The leading case relating to conduct as a reason for dismissal is **British Homes Stores v Burchell** 1980 ICR 303 which states that in order for an employer to rely on misconduct as the reason for dismissal there are three questions that the Tribunal must answer in the affirmative, namely, as at the time of the Claimant's dismissal:

- 25
- i. Did the respondent believe that the claimant was guilty of the misconduct alleged?
 - ii. If so, were there reasonable grounds for that belief?
 - iii. At the time it formed that belief, had it carried out as much investigation into the matter as was reasonable in the circumstances.

85. If the employer succeeds in proving there was a potentially fair reason for the dismissal, then whether the dismissal is to be considered fair or unfair depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee. This question has to be determined in accordance with equity and the substantial merits of the case (section 98(4) of the ERA) and includes an assessment of whether the procedure adopted by the employer was fair. It is now well-established that an employer may be found to have acted unreasonably under section 98(4) on account of an unfair procedure alone. This was the result of the decision in **Polkey v AE Dayton Services Ltd** 1988 AC 344.
86. What has to be assessed is not whether the dismissal is "fair" to the employee in the way that is usually understood but whether, with the knowledge the employer had at the time, the employer acted reasonably in treating the misconduct that he believed had taken place as reason for dismissal. It is not relevant whether in fact the misconduct took place. The question is whether, in terms of **Burchell**, the employer believed it had taken place (with reasonable grounds and having carried out a reasonable investigation) and whether in those circumstances it was reasonable to dismiss.
87. The Tribunal must be careful not to assume that merely because it would have acted in a different way to the employer that the employer has therefore acted unreasonably. The well-known case of **Iceland Frozen Foods Ltd v Jones** (1983) ICR 17 makes it clear that there may be a "band of reasonable responses" to a given situation. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to dismissal, falls within that band of reasonable responses. If so the dismissal is fair. If not the dismissal is unfair.

88. If the Tribunal finds that the claimant has been unfairly dismissed it can order reinstatement or alternatively award compensation. The claimant has indicated in this case that she seeks compensation only.

Discussion and decision

5 89. The claimant in this case had worked for the respondent for just over 2 years. She was an Assistant Cook at the respondent's Carnbroe Care Home in Coatbridge.

90. As detailed above, the disciplinary process stemmed from the claimant's conduct in the Care Home just prior to Christmas 2018.

10 91. There are certain issues raised by the claimant which can conveniently be dealt with at this point.

92. The claimant refers to the case of *McMillan*, saying that the Court of Appeal held that an employer does not have the right to increase a disciplinary sanction on appeal unless it expressly provides for this in its disciplinary procedures. The claimant says that the Court noted that the general understanding is that the right of appeal is conferred for employees' protection and that its exercise will not leave them worse off. The Tribunal found that this is not relevant in the claimant's case, in that there was no question of the disciplinary sanction being increased on appeal. Following a disciplinary hearing chaired by Mr Jamieson, the claimant was dismissed on the grounds of gross misconduct. The claimant then exercised her right of appeal. Subsequently, an appeal hearing was convened before Ms McGowan, where the latter rejected the claimant's appeal against dismissal. Ms McGowan simply dealt with the allegations which had been found proven following the disciplinary hearing

15
20
25

93. The claimant also referred to the case of *Ramphal*, saying that employees should be given notice of any changes in the case to allow an opportunity to deal with it. The claimant says that this is something she was not afforded the opportunity to do regarding additional charges. The Tribunal noted that four allegations had first been set out in a letter to the claimant dated 7 February 2019 (R49). Subsequently, by letter dated 22 February 2019, six allegations

30

were set out for the disciplinary hearing (R62 to R63). The allegations were set out differently and had been to an extent expanded. However, the Tribunal found that it was entirely clear that these were the allegations to be considered at the disciplinary hearing which was subsequently rearranged for 13 March 2019.

5

94. Following the disciplinary hearing itself, Mr Jamieson found the allegations to be substantiated and, in addition, made a finding that "... your actions put the residents of Carnbroe Care Home at risk as you cooked and served meat from a non approved source". If it is the claimant's argument that this matter should have led to the disciplinary hearing being adjourned, followed by an investigation into the matter in question, then the Tribunal rejects it. At the disciplinary hearing (page R70), the claimant was asked "Did you understand why we have reputable suppliers and only use these". The claimant replied "Yes the price. Cheap meat". Mr Jamieson then asked "Do you think there would be any other reasons why we use the same suppliers?" The claimant replied "Suppliers must be reputable and food must be traceable". The claimant then went on to accept she was aware of Mr Jamieson's proposition that, the overall reason is that if there was any kind of food poisoning that took place, there is a track and it can be traced by public health. It seemed to the Tribunal that there was therefore little or nothing to investigate. (At the Tribunal hearing, the claimant accepted that she had she had served meat from a source which had not been approved by the respondent; rather her case was that she sought to justify doing so as the meat came from a butcher regulated by Food Standards Scotland). The tribunal found that even if (contrary to its findings) there had been faults with regard to the disciplinary process, they would have been rectified by the Appeal Meeting. The claimant, who was represented by a trade union official, had ample time to prepare and present her case to Ms McGowan.

10

15

20

25

95. Again with reference to the case of *Ramphal*, the claimant points out that the involvement of a third party can prove detrimental to the outcome of disciplinary hearings. She goes on to state that, in her case, the third party was "Legal", saying that Ms McGowan makes reference to them during the appeal hearing (at R84). The claimant goes on to allege that Mr Jamieson

30

stated under oath that he was intending to apply a more reasonable response as opposed to gross misconduct. The Tribunal rejects the argument that a third party influenced the decision making in this case; there is simply no persuasive evidence of that. Of course, departments such as HR or “legal” often quite properly advise on matters of law and procedure. In this case, the evidence does not show any improper involvement; it seems to the Tribunal that Mr Jamieson and Ms McGowan made their own decisions. As far as the allegation relating to Mr Jamieson’s evidence before the Tribunal, the Tribunal has no record or recollection of that being said by him.

10 96. To return to more general matters, the respondent called Mr Jamieson to give evidence. Ms McGowan, former Area Manager with the respondents, appeared under a witness order. The Tribunal found them to be credible witnesses. Their evidence was coherent and straightforward; it assisted the tribunal in reaching its conclusions.

15 97. As stated by the respondent’s representative, the case was slightly unusual in that the conduct which formed the basis for the finding of gross misconduct was not in dispute. In her ET1 (page R17), the claimant states “Throughout the investigation I have always been honest and admitted making two staff a steak pie and one trifle on the premises”. She goes on to state “I was carrying out my duty of care to provide the residents with a choice of meals that the care commission says we must do. I incurred the full cost of the butcher meat and ingredients I supplied to the home over the festive period”.

20 98. The respondent’s representative explained that no evidence was led about the investigation (*conducted by Ms Dick*) as the outcome of the investigation was not in dispute. The representative went on to say that the material findings from the investigation were that: first, the claimant did prepare two steak pies and one trifle whilst at work; and secondly, the claimant used meat purchased from a third party butcher rather than one of the respondents regular approved suppliers to the care home.

25 99. The respondent’s approach as to the extent of the evidence led and the reasons for it seemed entirely reasonable to the Tribunal. However, in any event, the Tribunal found that the respondents had carried out a more than

reasonable investigation; the investigating officer interviewed 9 members of staff, some on more than one occasion. In addition, the investigating officer interviewed the claimant herself on two occasions, giving her ample opportunity to provide an explanation as to her conduct.

5 100. It is, of course, for the respondent to establish that the claimant was dismissed for a potentially fair reason. The Tribunal concluded that the reason for dismissal was conduct. There was no evidence to persuade the Tribunal to accept the claimant's contention that her dismissal was contributed to by financial difficulties within the organisation and/or that she was being pushed
10 out of her job due to restructuring.

101. The Tribunal was satisfied, on the basis of the evidence before it, that the respondent had a genuine belief that the claimant was guilty of the misconduct alleged. Mr Jamieson was provided with a copy of the minutes of the investigatory meetings. Mr Jamieson heard from the claimant in the
15 disciplinary meeting. The claimant, who was accompanied by a trade union representative, was afforded the opportunity to put her case. Mr Jamieson also identified what he considered to be a serious additional issue i.e. the introduction and use of meat from a non approved source in the care home. Mr Jamieson concluded that the claimant should be dismissed, without notice,
20 on the grounds of gross misconduct. In his letter of 15 March 2019 (at R74), he described the relevant aspects of the claimant's conduct as "wholly unacceptable".

102. The Tribunal was further satisfied that the respondent had reasonable grounds for holding that belief; Mr Jamieson had the evidence from the
25 investigation and heard from the claimant who had ample opportunity to explain her actions and argue her case.

103. Based on the findings set out in paragraph 99 above, the Tribunal was satisfied that, at the time the respondent formed that belief, it had carried out as much investigation into the matter as was reasonable in the circumstances.

104. The tribunal was satisfied that the respondent acted reasonably in treating the said reason (i.e. the misconduct that it believed had taken place) as a sufficient reason to dismiss the claimant.

5 105. The decision to dismiss fell within the band of reasonable responses. As set out in paragraph 10(v) above, the respondent's disciplinary procedure contains certain relevant examples of gross misconduct. In submissions, the respondent's representative stated that the claimant was evasive about the issue of where and when she made the steak pies and trifle, both during the disciplinary process and in cross examination. However, he points out that, 10 ultimately, the claimant did accept that she made the steak pies for her co-workers in the kitchen of the care home on Christmas Eve during working hours. The Tribunal accepts the respondent's position that that was a clear breach of the first two examples of gross misconduct (set out in paragraph 10(v)). Both managers involved in the disciplinary and appeal process found 15 that the claimant did not have management permission to act as she did.

106. The respondent's representative went on, in his submissions, to state that there is no dispute that the claimant brought in meat from a butcher who was not approved by the respondents. The representative points out (as recorded in paragraph 94 above) that in the disciplinary hearing, the claimant 20 recognised the requirement for reputable suppliers. Mr Jamieson was indeed clear of the risks which might arise when using meat from a non-approved source, especially in the context of a vulnerable client group. The Tribunal accepts the respondent's position that supplying and using meat from a non-accredited source would amount to a clear breach of the third example of 25 gross misconduct (as set out in paragraph 10(v) above).

107. The Tribunal found that dismissal was not pushed outwith the band of reasonable responses by compelling mitigating factors which the respondent had failed to take into account. As pointed out by the respondent's representative, the claimant was making food for her co-workers on Christmas 30 Eve, one of the busiest days of the year in the kitchen of a Care Home, when the claimant's time should have been devoted to her duties. In her own submission, the claimant states that she had been given two days workload

in one day. In relation to the supply of meat from a third party butcher, the respondent's representative also pointed out that Ms McGowan had confirmed that the respondent's usual supplier was available on the day and could have delivered meat (contrary to the claimant's suggestion that she acted as she did because she would not have been able to obtain supplies from the respondent's usual source). The Tribunal therefore rejects any argument that, as it was a limited amount of food (being prepared for co-workers) and/or the third party butcher was reputable, these are compelling mitigating factors.

10 108. Further, the Tribunal accepted the respondent's submission that the claimant's length of service is so short that it cannot effectively mitigate against the acts of gross misconduct found by the respondents. Indeed, the claimant had only been employed for approximately 25 months when she was dismissed. As mentioned in paragraph 10(xii) above, Mr Jamieson considered
15 mitigating factors in reaching his decision, including the claimant's previous conduct and length of service.

109. In conclusion, the Tribunal decided that the claimant was fairly dismissed from her employment; therefore, her claim must fail.

20 **110.** The respondent's representative raised the possibility of additional motions for the Tribunal to consider as set out at paragraphs 81 and 82 above. Given the Tribunal's findings, it is unnecessary to consider arguments relating to either *Polkey* or contributory conduct. In any event, remedy was severed and this hearing was to deal with liability only. Additionally, only written submissions were considered by the Tribunal and, bearing in mind the
25 claimant was unrepresented, the possibility of such arguments being raised therein was not canvassed at the conclusion of the hearing itself.

Employment Judge:

M Mellish

Date of Judgement:

20 May 2020

Entered in Register,

05 June 2020

5 Copied to Parties: