



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103274/2020

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Held remotely by Cloud Video Platform (CVP) on 22 and 23 October 2020

Employment Judge S MacLean

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Miss E Smith

**Claimant
In Person**

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Buckreddan Care Centre

**Respondent
Represented by:
Mr E Mowat -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the application for unfair dismissal should be dismissed.

REASONS

Introduction

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1. In the claim form sent to the Tribunal's office, the claimant complains that the respondent unfairly dismissed her when her employment was terminated on 12 March 2020. The claimant seeks compensation.

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2. The respondent admits the claimant was dismissed. It maintains that the dismissal was for a potentially fair reason: conduct, and that in all the circumstances, the dismissal was fair and reasonable.

3. In view of the current COVID restrictions and the Presidential Guidance, the parties agreed that it would be just and equitable for the hearing to be conducted remotely by Cloud Video Platform (CVP).

4. Chloe Stephenson, Deputy Care Manager, Michelle Lidington, Unit Manager, and Morag Wilson, Senior Carer, gave evidence for the respondent. The claimant gave evidence on her own account. Evidence was given orally.
5. The parties provided a joint set of productions. Oral submissions were made after evidence had been heard.

Relevant law

6. Section 98 of the Employment Rights Act 1996 (the ERA) sets out how a Tribunal should approach the question of whether a dismissal is fair. Section 98(1) and (2) provides that the employer must show the reason for the dismissal and that it is one of the potentially fair reasons. If the employer is successful, the Tribunal must then determine whether the dismissal was fair or unfair under sections 98(4).
7. *British Home Stores Ltd v Burchell* [1978] IRLR 379 established that a dismissal on the grounds of conduct would be fair in the following circumstances:
- (i) At the time of the dismissal, the employer believed the employee to be guilty of misconduct;
 - (ii) At the time of the dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and
 - (iii) At that time the employer formed belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.
8. The Tribunal has to consider by the objective standards of the hypothetical reasonable employer, whether in dismissing the employee, the employer has acted within a band or range of reasonable response to which the particular misconduct found of the particular employee. The Tribunal must not substitute its view for that of the employer. The band of reasonable responses test applies both to the decision to dismiss and to the investigation which led to that decision (see *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439; *Foley v Post Office*; *Midland Bank plc v Madden* [2000] IRLR 82.)

The Issues

9. At the final hearing, it was established that there was no dispute that the reason for the claimant's dismissal was misconduct: failing to follow appropriate moving and handling procedures. The claimant did not dispute that when Ms Lidington dismissed her Ms Lidington believed that the claimant had failed to follow the appropriate moving and handling procedure and that Ms Lidington had reasonable grounds for that belief given that the claimant admitted that she had failed to carry out that procedure during the investigation and at the disciplinary hearing. There was no suggestion that in these circumstances, the investigation was unreasonable. The claimant did not dispute her disciplinary record.
10. The issues therefore for the Tribunal were:
- (i) Was dismissal a fair sanction applying the "band of reasonable responses test"?
 - (ii) What, if any remedy, would be awarded to the claimant?

Findings in fact

11. The respondent provides 24 hour a day nursing and residential care for adults. It trades as a partnership. The partners are Andrew Fitzsimmons, Theresa Fitzsimmons, Ford Fitzsimmons and Buckreddan Care Centre Limited.
12. The nursing home comprises of two houses: Garnock and Eglinton. Jaynie Hanvey is the care home manager. Chloe Stephenson is the deputy care manager. Michelle Lidington is the unit manager of Eglinton. Laura Murray is a staff nurse and Morag Wilson is a senior carer both of whom work in Eglinton.
13. The respondent employed the claimant from 5 October 2017 until 12 March 2020. The claimant commenced employment with the respondent as a trainee care assistant. The claimant had a three-month probationary period during which she completed an induction pack and was assigned a mentor. The claimant completed the induction on 5 January 2018.

14. The claimant carried out a modern apprenticeship. On completion of the course on 22 August 2018, the claimant continued to work for the respondent as a care assistant based in Eglinton.
15. The claimant received training throughout her employment. This included a one day moving and handling course in December 2017 and annual refresher training in November 2018 and November 2019. The claimant also received training on skin care.
16. Following a Care Inspectorate Inspection, the respondent was set various requirements including the requirement to improve the quality of skin care in accordance with good practice to significantly reduce the instances of pressure sores and skin damage. The claimant was aware of this.
17. The claimant was also aware and had access to the respondent's policies in relation to moving and handling; prevention and management of pressure ulcers and the claimant's disciplinary policy.
18. From around January 2019 Morag Wilson, Senior Carer was involved in supervising the claimant. Under the respondent's supervision procedure every four months the claimant and Ms Wilson had a supervision meeting to agree an action plan and objectives for the following four months for personal development. Documentation was completed recording what was agreed.
19. During the claimant's employment, she received two warnings under the respondent's absence management proceedings; a written warning on 18 January 2020 and a final written warning on 23 August 2018.
20. Ms Lidington conducted a disciplinary hearing with the claimant on 19 September 2018 to consider allegations that the claimant had failed to provide an adequate level of care to a resident by failing to wash a resident before changing him into his nightclothes and had used offensive language when she was questioned about the incident. At the disciplinary hearing, the claimant accepted that she had failed to wash the resident. She was unable to provide any explanation as to why she had previously said that she had washed him. She accepted that she had used offensive language when

initially questioned about the incident. Ms Lidington concluded that the claimant had failed to provide an adequate level of care; had used unacceptable language when questioned about the incident; and had lied about it when initially questioned. The claimant was issued with a final written warning which was confirmed in writing. The claimant was told that the final written warning would remain on her record for one year. The claimant did not appeal the decision.

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21. Ms Stephenson conducted a disciplinary hearing with the claimant on 5 September 2019, on account of the claimant's failure to attend compulsory training. The claimant was issued with a verbal warning which was confirmed in writing. The claimant was told that it would be on her record for one year. She did not exercise her right of appeal.

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22. Ms Stephenson conducted another disciplinary hearing with the claimant on 28 October 2019 to consider an allegation the claimant had failed to provide an adequate level of care and had failed to ensure a resident's safety and wellbeing. It was alleged that the claimant had assisted a resident to the toilet and had then failed to go back and check that he was finished. The resident was unable to transfer himself from the toilet without assistance. As a result of the failure to check, the resident was left in the toilet for three hours and ultimately had to crawl from the toilet to his chair.

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23. During the disciplinary process, the claimant accepted that she should have checked on the resident. She apologised for her failure to do so. The claimant was advised that she was being issued with a final written warning and that the incident was being reported to SSSC. The claimant was told that she had to take responsibility for her actions and was to complete an induction booklet. The claimant was informed that she would be on a three-month probationary period and any further instance like this would result in her losing her job; she had been previously involved in an incident for failure to provide an adequate level of care. The claimant was informed of the decision in a letter dated 28 October 2019. The claimant was advised of her right to appeal. She did not exercise that right. The claimant was asked to prepare a written reflective account in respect of the incident which she did.

24. On 30 October 2019 the claimant was issued with an induction pack with scheduled completion on 30 January 2020. Ms Wilson was her mentor. The initial documentation was completed on 4 November 2019.
25. During a routine supervision meeting on 6 January 2020, Ms Wilson commented in the supervision form that the claimant was on a three-month probation and in that time, they would go through the induction booklet. Ms Wilson also commented that the claimant “was capable of this and needed to improve in certain areas”. Ms Wilson wrote that she would “go through her booklet with her and help her understand the importance of her role as a carer”. The induction booklet was not completed.
26. An incident occurred on 5 February 2020 during the course of the nightshift. The nurse in charge was Staff Nurse Laura Murray who prepared a signed handwritten statement. In her statement Staff Nurse Murray recorded that she had observed that a resident was lying on her left side at around midnight. Staff Nurse Murray then checked the resident around 3am and noticed that she was still lying on her left side. After making enquiries of the member of staff working in that corridor, Staff Nurse Murray was told that the claimant and her colleague had attended the resident at the 1am bed round. Staff Nurse Murray asked the claimant if she had attended the resident and turned her at 1am. The claimant said, “Yes”. Staff Nurse Murray asked if the claimant was sure because the resident was on her left side when she was seen at midnight. The claimant replied, “I will go and turn her now.” Staff Nurse Murray asked, “Did you turn her at 1am, yes or no?”. The claimant replied, “No”.
27. In terms of the respondent’s moving and handling procedures, a sliding sheet is required to be used when turning a resident. Staff Nurse Murray also recorded that she had reminded the claimant and her colleague to use the sliding sheet earlier than evening when she had observed them leaving another resident’s room without the sliding sheet. Ms Murray asked the claimant if they had used a sliding sheet to turn the resident. They returned and turned the resident properly.

28. The claimant was invited by letter dated 7 February 2020 to attend a disciplinary hearing on 13 February 2020 to be conducted by Ms Lidington. The claimant was advised that the purpose of the disciplinary hearing was to give her an opportunity to provide a satisfactory explanation for her failure to follow the appropriate moving and handling procedure. The claimant was told that Carol Haxton, Personnel would act as a witness. The claimant was informed she had the right to be accompanied by a work colleague or a trade union official. Enclosed with the letter was a copy of the respondent's disciplinary policy and Staff Nurse Murray's handwritten statement.
29. The claimant attended the disciplinary hearing on 13 February 2020. She chose to be unaccompanied. Ms Haxton attended, and notes were taken. The claimant confirmed that she understood why the disciplinary hearing was taking place. She was given another copy Staff Nurse Murray's statement. The claimant was asked if she agreed with the statement to which she replied she did. The claimant was invited to explain what had happened. The claimant said that it was as stated in the written statement. Ms Lidington asked if the claimant had turned the resident. She confirmed that she did after it had been raised by Staff Nurse Murray.
30. Ms Lidington said that claimant had lied about turning the resident at 1am. The resident now had a grade two pressure sore to which the claimant had most definitely contributed because the claimant could not be bothered. The resident had been in the care home for 10 years and never had a pressure sore. Ms Lidington considered that the claimant knew the importance of turning residents to prevent breaks in skin and yet she had lied and said she had turned the resident and had lied saying she had used a sliding sheet. Looking at the disciplinary record, the claimant had a live final written warning which was issued on 28 October 2019. Taking that into consideration the claimant was being issued with four weeks' notice of termination of employment and that she was to work alongside another member of staff and not to work on her own during this period. The claimant was asked for her comments to which she said she was sorry. Ms Lidington indicated that it was not acceptable as the resident had a pressure sore and that the claimant had

been asked to complete the induction booklet following the previous incident, but she still had not done so. Ms Lidington said that she would need to report and explain this to the Care Inspectorate and the SSSC.

5 31. Ms Lidington wrote to the claimant on 14 February 2020 advising of her decision. The claimant was also advised of her right of appeal. The claimant did not exercise this right.

32. At the date of dismissal, the claimant was 20 years of age. She had been continuously employed by the respondent for two years. The claimant earned £376.25 gross per week which equates to £324.28 net per week.

10 33. Since the termination of her employment, the claimant has been in receipt of Universal Credit. She has applied to seven care homes for employment. The claimant was offered a job which she accepted but was unable to take up because of unsatisfactory references. The claimant started a full-time course at Kilwinning College in mid-September 2020 for early learning and childcare.

15 **Observations on witnesses and conflict of evidence**

34. In relation to the material facts, there was little in the way of disputed evidence.

35. Ms Stephenson's evidence was credible and reliable and was entirely consistent with the contemporaneous documents and correspondence.

20 36. Ms Lidington was a credible witness. In some respects, her evidence was vague. The Tribunal did not consider that this was in any way an attempt to mislead the Tribunal but was rather due to the fact that she is currently on maternity leave and is in the advanced stage of pregnancy. It was apparent she was in some discomfort while giving evidence and while she endeavoured to answer honestly and truthfully, she could not specifically recall certain
25 events.

37. Ms Wilson gave her evidence in a candid straightforward manner. It was clear that she was an experienced member of staff who had endeavoured to be supportive of the claimant.

38. The Tribunal did not consider that any of the respondent's witnesses had any animosity towards the claimant. Indeed, the impression was to the contrary. They had endeavoured to be supportive and assist the claimant throughout her employment and the decision to terminate her employment was made more in frustration and disappointment than anything else.
39. There was a conflict of evidence in relation to the resident's condition after the incident in February. Ms Lidington, who is a qualified nurse had examined the resident following the incident and considered that the resident had a grade 2 pressure sore. The claimant suggested that from the information that she received from former colleagues it may have been an abscess. The Tribunal did not consider that there was any reason for Ms Lidington to misrepresent the situation particularly as the matter was to be reported to the Care Commission. In any event the Tribunal did not require to make any finding in this respect. Ms Lidington's evidence was that she did not believe that the resident's condition was caused by the claimant, rather the claimant's failure to follow the appropriate procedures which helps prevent breaks in the skin contributed to the resident's condition.
40. There was also disputed evidence about where the induction booklet was kept. Ms Wilson said that the claimant had the booklet. The claimant said that she did not have it and it had been produced by the respondent for these proceedings. The Tribunal considered that this was not a material finding as the claimant accepted that she knew how the booklet ought to be completed, having done so previously, and that there was a time limit of so doing. The claimant knew that the booklet had not been completed but was waiting for Ms Wilson to take the lead.

Submissions

41. Mr Mowat helpfully set out what he considered to be the core undisputed facts. He submitted that the reason for the dismissal had been established as conduct which is a potentially fair reason. He also submitted that the investigation was reasonable in this case as the conduct was admitted. The issue was to whether the condition was a pressure sore or abscess was

irrelevant as the claimant was not dismissed because she contributed to the condition but rather because she already had previously failures; there was a live final written warning and the claimant had lied. The claimant had various opportunities to complete the induction booklet but had not done so. Mr Mowat submitted that this was not a case where the respondent had jumped to dismiss the claimant but to the contrary. She had two final written warnings and had been given a further opportunity to go through the induction process.

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42. Honesty is very important in employment but especially in relation to the care sector. The decision, while taken during the disciplinary hearing, was not taken until the claimant had been given the opportunity to respond. Given the situation, there was nowhere else the respondent could go. The decision to dismiss was fair and reasonable. The claimant did not appeal.

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43. If the Tribunal was not with the respondent in this respect, then there ought to be a substantial deduction to any compensatory award because of the contributory fault. There should also be a deduction for failing to follow the procedure to its conclusion and making an application to appeal.

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44. Mr Mowat suggested that there had not been much in way of mitigation. There were many jobs available in the care sector and while it would be difficult to get another job given that the claimant was dismissed, it was not impossible. In any event, the claimant had decided to attend college in September 2020 and therefore any loss should be restricted to that period.

45. The claimant was invited to respond. She had no further comment to make.

Deliberations

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46. The Tribunal had to decide whether the claimant had been unfairly dismissed and if she was unfairly dismissed, what remedy to award.

47. In reaching a judgment in this case, the critical question for the Tribunal was whether the claimant's dismissal was fair in terms of section 98 of the ERA.

48. It was not disputed that the reason for the claimant's dismissal was conduct and that it was one of the potentially fair reasons for dismissal. The conduct

for which the claimant was dismissed was in relation to the incident on 5 February 2020. The claimant did not dispute the facts set out in Staff Nurse Murray's statement nor did the claimant provide any explanation or mitigation other than that she was sorry. The Tribunal was satisfied that in reaching the decision to dismiss the claimant, it was irrelevant whether the resident had an abscess or a grade 2 pressure sore. In any event, if the claimant had considered that this was a relevant factor which should have been taken into account, then she could have appealed so that the matter could have been explored. She did not do so.

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10 49. The Tribunal then considered whether the dismissal was fair or unfair in accordance with section 98(4) of the ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reasons shown by the employer and the answer to that question depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the respondent acted reasonably in treating this as a sufficient reason for dismissing the employee and that this should be determined in accordance with equity and the substantial merits of the case.

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20 50. The Tribunal considered the reasonableness of the respondent's conduct. The Tribunal noted that it must not substitute its own decision as to what the right cause to adopt for that of the respondent. The Tribunal applied the range of reasonable responses approach to whether the respondent had carried out a reasonable investigation and had reasonable grounds for its belief the claimant was guilty of misconduct.

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30 51. The Tribunal had no doubt that Ms Lidington believed the claimant had lied not only in relation to having turned the resident but also in relation to using the sliding sheet. This was a genuine belief as the claimant had confirmed the position during the course of the disciplinary hearing. Ms Lidington had also seen the resident and was aware of her condition. Ms Lidington was also aware of the claimant's disciplinary record and that the claimant had not completed the induction booklet.

52. The Tribunal then considered the procedure that had been followed. The claimant was aware of the allegations that had been made against her. She was provided with a copy of the disciplinary process of which she was familiar having previously undergone two disciplinary hearings. The claimant was also provided with a copy of Staff Nurse Murray's statement and a further copy was provided during the disciplinary hearing.
53. There was no suggestion that the claimant's actions were gross misconduct. Had this been the only incident on the claimant's disciplinary record, then it is highly likely in the Tribunal's view that the claimant would have been dismissed. The reason why dismissal was related being considered was because the claimant had a live written warning on her record, and this was a further incident of a similar nature.
54. The Tribunal was satisfied from Ms Lidington's evidence that she did not automatically impose the sanction of dismissal. She wanted to hear the claimant's explanation at the disciplinary hearing. Ms Lidington was aware that alternative sanctions were available, and she did not take the decision to dismiss lightly.
55. The Tribunal observed that Ms Lidington knew that the claimant had a history of poor care towards residents. The claimant had been employed for over two years and had already received warnings in respect of the attendance procedure and the disciplinary procedure. The claimant apologised in this incident but did not appear to take any responsibility or reflect in future that she would do things differently. The Tribunal could not conclude that the decision to dismiss the claimant fell out with the band of responses which a reasonable employer might have adopted.
56. The Tribunal noted that a failure to carry out a reasonable and proper procedure at each stage of the dismissal was relevant to the reasonableness of the whole dismissal process. The claimant did not exercise the right of appeal. Accordingly, any concerns that she may have had about the severity of the resident's condition could not be considered by the respondent. In any event, the Tribunal considered that the claimant's failure to appreciate that

this was irrelevant in the decision-making process highlighted the lack of insight on her part about her failure to take responsibility, be honest and to learn from mistakes.

57. The Tribunal was satisfied that the respondent had carried out reasonable and proper procedure at each stage of the dismissal process.

58. The Tribunal concluded that the dismissal was fair. Having reached this decision, the Tribunal did not consider it necessary to go onto consider the question of remedy.

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Employment Judge: Shona MacLean
Date of Judgment: 23 October 2020
Entered in register: 20 November 2020
and copied to parties

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