EMPLOYMENT TRIBUNALS

Claimant: Mrs J Dickson

Respondent: Barchester Healthcare Limited

HELD AT: **Leeds by CVP** **ON:** **21 December 2020**

BEFORE: Employment Judge Lancaster

REPRESENTATION:

Claimant: Mrs C Dickson (friend)
Respondent: Mr P Singh

JUDGMENT at the remedy hearing having been sent to the parties on 22 December 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided, taken from the transcript of the oral decision given immediately upon the conclusion of the case:

REASONS

1. Firstly, by consent the damages for the wrongful dismissal (the breach of contract claim) are the gross six weeks net wages the claimant would have been entitled to had she been given proper notice. That is £3,328.68. That is awarded gross because as I said earlier that is taxable in the claimant's hands.
2. I turn now to the claim of unfair dismissal. The claimant was dismissed for a reason related to conduct, which is potentially fair. The respondents argue that because her conduct was culpable both the basic award and any compensatory award for what is now, nonetheless, conceded to be an unfair dismissal should be reduced accordingly.
3. It is then for the respondents to show what the claimant actually did, and in fact there is very little dispute in this case. This was an unfortunate incident involving

a resident at the care home where the claimant worked. The claimant was delivering a meal to that elderly lady, she realised that the drink was too hot and she sought to put it out of reach of the resident. Unfortunately, she misjudged that. The elderly resident was able to reach to where her cup was and she spilt it. She sustained burns to her back and her breast. The claimant when questioned about this matter conceded that her normal practice on realising that a drink was too hot would have been to seek to cool it down by placing in the sink, and that she had not done that on this occasion. She also when questioned accepted, in response to a suggestion from the disciplinary officer, that she had acted without proper concentration or could have been more careful. The essential facts as to what she did remain. She realised a drink was too hot, she did not wish therefore wish to give it to the elderly resident, she thought she had put it out of her reach and she got that wrong.

4. It is now conceded that that of itself would not amount to gross misconduct and I consider that is a perfectly proper concession. It could not. It is a single act of misjudgement. It is certainly not gross negligence on the part of the claimant.

5. Of course, it had consequences for the resident. I have seen photographs: the reddening to her back and her breast does look very unpleasant. However, that is largely incidental to ascertaining what the claimant did wrong. In any event I note that the contemporaneous records, in particular the report to the CQC which seems to be two days after this incident -the event was 11 November of last year. That report refers to a doctor's assessment on 13th and that records, which is in accordance with another document, that the injuries to the back appear to have been largely healed by that stage two days later. Certainly, the doctor expressed no concerns that the injury to the lady's breast would also not heal appropriately. Apparently, this resident has certain sensitivities, of course she is elderly and there is a slow recovery time, but the doctor recorded no concerns about the fact that she would recover within a reasonable time frame. And indeed, it seems to me abundantly clear that part of the reason for her being in that position two days later was that having made that initial mistake the claimant acted promptly in seeking assistance; getting help to remove the lady's clothing so she was no longer exposed to the hot liquid on her nightdress and calling for immediate medical assistance from a nurse who applied the relevant cold compresses that assisted the initial treatment.

6. So on that basis as to what the claimant actually did wrong, although I consider that it does require a necessary reduction both in the basic award on the grounds that this is culpable conduct before dismissal, and also to the compensatory award on the grounds that it caused or contributed to that termination, I conclude that it is a relatively small reduction. In my view it should be 10%.

7. That means that the basic award which would otherwise have been £4725 -that is nine weeks pay based on six years' continuous employment all of which qualify the claimant for one and a half weeks' pay subject to a statutory cap which was then £525- is reduced by 10%. It gives a basic award of £4252.50. I shall in due course apply that same 10% reduction in relation to that contributory conduct. That is what the claimant actually did wrong in departing from her normal practice and so placing herself in a position where she made a mistake.

8. So far as the compensatory award is concerned, although the primary reason for termination was this act of conduct, a mistake that led to the injuries, there are a number of procedural errors in these proceedings.

9. The claimant did not have an entirely clean record. She had a warning in 2015 and she was also subject to a final written warning in November 2018. That had just expired by some five days by the date of this incident last year. However, that was clearly something that had a bearing on the decision making. That is not necessarily wrong. I indicated at the preliminary hearing that the fact that a warning had expired does not automatically mean that it is irrelevant. However, I now see from looking at the file that on the original invitation to the disciplinary hearing, it wrongly read as if that were a live warning and would therefore be taken into account and may contribute to the decision. And of course, if somebody does commit a further offence of misconduct during the currency of a final written warning usually that would lead to termination. But that was a mistake. It was not a current warning. And I also note from the notes of the disciplinary hearing that when the claimant sought to address that point she was cut short. In a sense that is correct, that the time for appealing that decision had long expired, but if it was going to be taken into account as a material factor she ought to have been given the opportunity to explain the position. I do note that that original sanction was imposed by a different manager so the facts would not necessarily have been known at first hand to the dismissing officer in this particular instant case. As I say the claimant was not given the opportunity of addressing that point.

10. It is also clear through the correspondence that has subsequently come to light on the claimant's subject access request, and in part also corroborated by the records of the hearings, that the dismissing officer had regard to what she perceived to be a history of other incidences in the 12 months since the imposition of that previous final written warning. There is no evidence put before me as to any substance to those allegations. There is a general assertion that there was a deficiency in record keeping, but if those matters were to be taken into account -and all the contemporaneous documents suggested they were indeed a material factor in the mind of the decision maker- the claimant should have been given the opportunity of addressing those concerns specifically.

11. It is not only a matter on an unfair dismissal claim of a claimant to the employee being given the opportunity to put forward positive mitigation, she must also be given the opportunity to respond to any matters that are in the mind of the dismissing officer which militate against the most severe sanction not being imposed. The claimant was not afforded that opportunity. Nor was she afforded the opportunity to address alleged deficiencies in her attendance or timekeeping. It is common ground that there had been no actual disciplinary action taken against her. So again, if this was to be a factor she should have been allowed to address it and she was not.

12. It does therefore appear to me that there is a clear argument that for some reason the dismissing officer was pre-disposed to find against the claimant in this instance irrespective of how she viewed the severity of the immediate event. That is corroborated again by the correspondence between the dismissing officer and human resources. It is significant that the manager elected not to follow the recommendation of HR as to the appropriate level of sanction that would be merited by the actual misconduct on this occasion.

13. At the end of the disciplinary hearing the claimant was told that advice would be taken. It was sought. The hearing was the 22nd and the first evidence I have of a contact by email (there may however have been verbal or telephone communications in addition) was on 26th. When the response came back in writing

from HR on the morning of 4 December it indicated that their advice was that this was not a matter that warranted dismissal and should be dealt with by way of a warning. However, the dismissal letter had already been issued on 3 December so the dismissing officer did not wait for any considered advice coming from HR. When she responded to HR that she nonetheless considered, in large part, as I find, because of the reasons that were not disclosed to the claimant, that this did warrant dismissal, the advice came back again that it should be dismissal on notice. Once again that was ignored because it was too late. Whoever had drafted the initial letter of 3 December it had been signed by the dismissing officer, and she had endorsed the view there that it warranted summary dismissal for alleged gross misconduct.

14. So, I have to come to a decision as to what is the probability that had there been a fair process procedurally, where the claimant was fully appraised of all those matters in the mind of the dismissing officer, that she would nonetheless have been dismissed for this single act of misconduct which was not gross misconduct.

15. I take into account the fact that the matter did go on appeal and that decision was endorsed, but again the appeal did not address the problems of identifying what additional factors were in the event taken into account that should not have been - or at least should not have considered without proper disclosure to the claimant. I do however have two qualified nurses who have considered the facts and there must therefore be a chance that, even if the claimant had been allowed properly to address these concerns, the decision could still have been taken on those facts that it warranted dismissal though not with immediate effect.

16. I considered that the appropriate reduction to allow for that chance is 25%. Discounting the extraneous matters that clearly weighed with the dismissing officer I consider that it would have been a harsh decision to dismiss, particularly given the advice of HR. There is then a further 10% reduction to take account of what I have already determined to be the relevant contributory conduct.

17. So, looking at the figures I have already awarded compensation for the six weeks' notice period. That would run therefore from 3 December last year until 21 January this year, and of course the claimant will not be compensated twice so I am looking at her further losses from the 21 January. Up to today's date that is 49 weeks. The claimant has not been able to find alternative employment. It is for the respondent employer to prove that she has failed to mitigate her loss if they seek to run that argument and they have not done so. The claimant has applied for other work, I consider it reasonable in the circumstances that she did not apply for other posts in the care industry. She had at that point been dismissed ostensibly for gross misconduct in relation to her care of an elderly patient and it is understandable that she did not apply within this sector until this matter had been resolved. It was of course only very recently the respondent conceded that this does not properly constitute gross misconduct on her part.

18. So, for that 49 weeks a total figure the claimant's net weekly loss would be £445.28. That is taking her yearly loss calculated on the nine months' pay figures of £23,154.48 and divided that by 52. So for the 49 weeks her total net loss over that period in terms of wages would be £21,818.72. There is further a simple calculation to add to that the amount that she would have received by way of employer's pension contributions and that would be at £13.10 per week so over the 49 weeks an additional £641.90. That means that her loss of income and loss of pension

contributions for the 49 weeks since the end of the notice period to today's date will be £22,460.62.

19. I must also therefore look at the future loss. The claimant assesses that now once it has now been established that she was not guilty of gross misconduct she believes she will be able to obtain alternative work in the care industry or other if she chose within three months. That may be a slightly conservative estimate but I do not award more and I do note of course in the current circumstances there is an urgent need for those who are able to offer frontline support in the care industry. So, the three months' further loss of income and pension contributions will be £5,958.90. That will be a total financial compensatory loss over the period to date plus three months into the future of £28,419.52. I also award the conventional sum of £500 which is slightly less than one weeks' pay in this case for loss of statutory rights. So that takes the figure up to £28,919.52. But applying the reductions I have decided upon I reduce that by 25%. That brings it down to £21,689.64 and I reduce that figure then by a further 10% to take account of the conduct and that brings it down to £19,520.68. That is well within the statutory cap in this case.

20. The recoupment provisions apply. The claimant has received a relatively small amount by way of Jobseekers Allowance but I do not and cannot deduct that immediately from the award. The way the regulations apply is that the government is entitled to recover directly from the employer those sums that they have paid out to the claimant and only when they have recovered that sum by way of recoupment is the balance then payable from the employer to the employee.

21. So as far as the unfair dismissal award is concerned, the total amount for basic award and compensation is therefore £23,773.18, but the prescribed amount for recoupment purposes -that is the loss of wages from the date of termination to today's date as covered by the unfair dismissal award - is £14,727.64. As I say that prescribed period is 3 December to 21 December 2020. So, it means that that sum of £14,727.64 is not payable immediately. Only the balance will become due once the government has recovered the Jobseekers Allowance. It does nonetheless leave an excess which is payable now of £9,045.54. That of course is in addition to the breach of contract damages. I calculate therefore the total award both for wrongful dismissal and for unfair dismissal in this case is £27,101.86 and that is the sum I award to the claimant.

Employment Judge Lancaster

Date 12th January 2021

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