EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms S Ablett	**v**	Anchor Hanover Group

Heard at: **London South (by video)** **On: 27 to 29 January 2021**

Before: **Employment Judge C H O'Rourke**
Ms S Gledhill
Mr D Rogers

Appearances
For the Claimant: **Mr Ablett – Claimant's son**
For the Respondent: **Ms Swords-Kieley - Counsel**

(The Claimant having, within fourteen days of the Judgment being sent to her, requested written reasons, in accordance with Rule 62(3) of the Employment Tribunal's Rules of Procedure 2013, the following reasons are provided:)

REASONS

Background and Issues

1. By a claim form dated 1 October 2019, the Claimant brought claims of unfair dismissal and race and age discrimination. She had been employed by the Respondent, as a carer, for approximately five years, in one of their residential care homes. She was subject to disciplinary proceedings in May to July 2019 and subsequently dismissed, without notice, for gross misconduct, with effect 23 July 2019 and which was subsequently amended to dismissal on notice. The essence of the charge against her was that, on the night of 23/24 April 2019, she and two others had lifted a resident, who had fallen from her bed, off the floor, which was considered contrary to procedures, thus endangering the resident.

2. The issues in this claim are set below.

3. Unfair Dismissal

   3.1. What was the reason for dismissal? The Respondent states that it was conduct, a potentially fair reason for dismissal, whereas as the Claimant states that it was an attempt to 'engineer' her dismissal.

3.2. Had the Respondent a genuine belief in the Claimant's 'guilt', based on reasonable grounds, following as much investigation as was reasonable in the circumstances? While the Claimant did not dispute the extent of the investigation, she considered that the Respondent could not have had a genuine belief in her 'guilt', as the procedure she was meant to follow, with the resident, was unclear (and as subsequently determined at appeal)

3.3. Did the Respondent adopt a fair procedure? The Claimant challenged the fairness of the procedure, on the ground that based on her age (with reference to understanding and hearing) and English not being her first language, she was prevented from fully comprehending the procedure.

3.4. The Claimant contends that dismissal was outside the range of reasonable responses, bearing in mind the lack of clarity as to the procedure for dealing with residents in this state, her junior status (one of the three employees involved being a team leader) and that no harm came to the resident.

3.5. In the event of a finding of unfair dismissal, the Respondent contends that the Claimant's actions contributed to her dismissal.

3.6. The Respondent would also seek to rely on the *Polkey* principle, in the event of a finding of procedural unfairness, to show that the Claimant would have been fairly dismissed, in any event, as she already had a live final written warning on her record.

3.7. Finally, the Claimant considers that there were breaches of the ACAS Code, as to a failure to promptly suspend her from work and delays in the process and that there should be an uplift in any award made.

4. Direct Discrimination (race and age). The Claimant states that she is an Israeli, whose first language is Hebrew and that at the time of the dismissal she was aged 68.

4.1. Did the Respondent subject the Claimant to the following treatment, falling within s.39 of the Equality Act 2010, namely, obliging her to engage in a disciplinary process that was conducted in such a way that she was unable to understand and defend herself?

4.2. Did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant relies, in this respect, on a hypothetical comparator of a non-Israeli, or a younger person with greater cognition and better hearing.

4.3. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race/nationality or age?

4.4. If so, what is the Respondent's explanation? Can it provide a non-discriminatory reason for any proven treatment?

4.5. If there was discrimination on grounds of age, can the Respondent show that it was a proportionate means of achieving a legitimate aim.

5. Indirect Discrimination. In the alternative, the Claimant argues that she suffered indirect discrimination, in relation to the same detriment, reliant on the same protected characteristics. We must determine whether or not the Respondent had a PCP of conducting disciplinary hearings in English, which they applied to employees not sharing the Claimant's protected characteristics and that such a PCP put persons sharing her characteristics (and she herself) at a particular disadvantage? If so, again, the Respondent can argue that any such discrimination was a proportionate means of achieving a legitimate aim.

The Law

6. We were reminded by Ms Swords-Kieley of s.98 of the Employment Rights Act and that when hearing a case of unfair dismissal, a Tribunal's powers are limited, specifically that we are not permitted to substitute our judgment for that of the employer. Rather, it is for us to say whether both the decision to dismiss (**Iceland Frozen Foods –v- Jones [1983] ICR 17 EAT)** and the way in which the investigation was conducted (**J Sainsbury Plc –v- Hitt [2003] ICR111 CA)** fell within the range of responses of the reasonable employer, in the circumstances in which the Respondent found itself. If the dismissal or the conduct of the investigation falls within the range, it is fair, if outside, then it is unfair. In a misconduct case such as this, we are guided by the case of **British Home Stores –v- Burchell [1980] ICR303 EAT** which sets out the well-known three-fold test, where the Tribunal must be satisfied that the employer held a genuine belief in the employee's guilt; that it had carried out a reasonable enquiry and that in consequence of that enquiry, it had reasonable grounds for holding that belief. The burden of proving fairness in this respect is neutral.

7. In respect of the discrimination claims, we note that the initial burden of proof is on the Claimant to establish a prima facie case that the Respondent has committed a contravention of the Equality Act, specifically, primary facts from which the Tribunal could reasonably and properly conclude, in the absence of any explanation to the contrary that there had been unlawful discrimination (**Ayodele v Citylink Ltd [2018] IRLR EWCA)**.

8. In respect of the relevance of prior warnings received by an employee and the account to be taken of them by Tribunals, we note the case of **Davies v Sandwell Metropolitan Borough Council [2013] IRLR EWCA**, which effectively indicates that a tribunal should not seek to go behind a previous disciplinary warning, unless there was compelling evidence to consider it manifestly inappropriate, which will not be easily established.

The Facts

9. We heard evidence from the Claimant and on her behalf, from a Ms Janet Hamilton, a former colleague. On behalf of the Respondent, we heard evidence from Mr Lukas Bogusz, a manager, who conducted the disciplinary procedure

and Mr Matthew Anstee Brown, a former manager at the Respondent, who heard the Claimant's appeal.

10. The Respondent is a very large employer, with the appropriate managerial and administrative resources.

11. Chronology. We set out the following chronology, upon which we comment as we consider appropriate:

    11.1. April 2014 – the Claimant commenced employment with the Respondent, having worked in the care sector previously for approximately forty years.

    11.2. 15 March 2019 - the Claimant was given a final written warning, which she appealed, unsuccessfully.

    11.3. Night 23/24 April 2019 (all dates hereafter 2019) – the Claimant and two other staff manually lifted a resident back into bed, after she had fallen out.

    11.4. 7 May – the Claimant referred to the incident in a meeting with a manager [141]. It is recorded that she told the manager that she '*stated that she'd heard a voice from the room of customer JT and when she went into the room she found JT on the floor. Simcha* (the Claimant) *stated that she pressed the emergency bell and the team leader, Ekpo, came and they assisted JT from the floor without using any equipment. When asked to clarify what happened Simcha described lifting the feet of JT, with Ekpo and Latifat lifting the top half and they all moved JT to the bed. When asked why they did not use a hoist, to get JT off the floor, Simcha replied 'the team leader was there, why would I decide that she had to use the hoist?'* She was suspended immediately thereafter, confirmed by letter next day [136].

    11.5. 22 May – at an investigatory interview, the Claimant stated that she had checked the resident for injury and noticed a cut on her eye and concluded that '*she must have hit her head'*.

    11.6. 5 July – a final investigatory report is produced, which recommends disciplinary action.

    11.7. 23 July – the disciplinary hearing proceeded, having been rearranged at her request, to include the appointment of an alternative chair and agreement that her son could attend with her, which the Respondent said that while contrary to their policies, they considered reasonable in the circumstances. Points of relevance from this hearing are as follows:

        11.7.1. She stated that she saw blood on the resident when she was on the floor, '*just a little cut'*. [170]

        11.7.2. She appeared to contradict her earlier account of having assisted in lifting the resident, saying that she was told by the team leader to leave and carry on with other jobs [169].

11.7.3. She is reminded that she has a live written warning.

11.7.4. She was dismissed, without notice, at the conclusion of the meeting.

11.8. 29 July – the decision is confirmed by letter [172]. Mr Bogusz recorded that the Claimant had shown '*no remorse during the hearing and your responses contradicted those that you made during the investigation process.'*

11.9. 20 August – on behalf of his mother, Mr Ablett submits an appeal [178]. For the first time, the Claimant's ability or otherwise to understand '*comprehensive*'/complex English, both spoken and written, is mentioned, with the implication that she may not have understand much of what had been said in the prior meetings. He also stated that she was not at sole fault for the incident. He asserted that '*no harm came to the resident ..'*, as being a relevant factor. The care plan [156] was referred to, with Mr Ablett pointing out that there was an option in the plan to get the resident up from the floor, without using a hoist. He also emphasised that the Claimant suffered partial hearing impairment in one ear only and complained as to her being allegedly referred to as 'deaf', implying that use of such a term was discriminatory.

11.10. 18 September – an appeal hearing was held, having been postponed at the Claimant's request, from an earlier date [183]. The Claimant continued to deny that she had done anything wrong, saying that she might only consider using a hoist if the resident was '*big'*. Mr Anstee Brown specifically asked her about her ability to understand English, stating '*in terms of your understanding of English, do you have any additional support or anything to help you? Be it outside support or anything to help you understand? Or do you feel you don't need that?'* She responds '*I feel I don't need that, but if I do need, I always ask. I'm not ashamed, I'm not embarrassed. If I don't understand, I always ask.'* When asked about her understanding of the disciplinary hearing, she did not say she didn't understand Mr Bogasz, but that she didn't feel comfortable with him. The notes record on several occasions that Mr Anstee Brown asked her if she understood what was being said and she confirmed that she did. She confirmed that she had received all relevant training and indeed this is not an issue that arose in the claim. While she said that she had simply followed instructions from the team leader, which she was obliged to do, Mr Anstee Brown said that '*the duty of care trumps everything'*.

11.11. 8 November – Mr Anstee Brown confirmed his decision to uphold the dismissal, albeit that he converted it to dismissal on notice [196]. He found that the care plan was unclear as to the use of a hoist, but that taking all the other circumstances into account, to include the fact that the resident was fragile and had suffered a head injury and should therefore have been checked by a medical professional, before being moved and that the Claimant should have been aware (particularly considering her training and experience) that moving the resident in this fashion placed her '*at considerable risk of harm'*. He noted that she was obeying the instructions

of the team leader, but considered that she should have questioned such instructions. He also noted that she had a final written warning. Finally, he recorded her concerns about her ability to understand the process, but considered that he had done all that was possible to make it clear to her and she had raised no concerns during the hearing.

12. Claim of Unfair Dismissal. We turn now to the issues we need to consider in respect of this claim:

12.1. Has the Respondent shown the reason for dismissal? As stated, the Respondent relies on misconduct, but the Claimant asserts that the process was 'engineered' to get rid of her. However, there was no evidence whatsoever that there was such a plan on the Respondent's part and we note, from the Respondent's evidence that they similarly dismissed the other two employees involved, indicating that the Claimant was not the sole focus of their considerations.

12.2. Did the Respondent have a genuine belief in the Claimant's 'guilt'? The sole argument advanced by the Claimant in this respect was that such belief could not have been present, as the care plan was unclear (as agreed at appeal). The care plan [157] offers two options as to getting a resident off the floor. The first, without a hoist, is appropriate '*if the customer appears to be uninjured, a qualified first aider should conduct a top to toe assessment, before assisting the customer to get up … If the customer is, or appears to be injured, health professional advice should be sought immediately and the customer moved only on their advice.'* The wording for the option as to use of a hoist is the same. We find that the Respondent did have a genuine belief, for the following reasons:

12.2.1. Both Respondent witnesses were unshaken in cross-examination as to their belief that the Claimant had committed gross misconduct.

12.2.2. Based on the frailty of the resident and the fact that the plan states that for her to get *out* of bed a hoist was required, it's clear that the standard typed wording used for the option of not using a hoist was probably redundant and should have been deleted, or marked 'not applicable'. However, even if that option was still open to the Claimant and her colleagues, the description is crystal-clear that if an injury is observed (which the Claimant accepts was the case), there should be no question of moving the resident, until she is examined by a health professional (not merely a first-aider). This policy was clearly not followed and therefore the Claimant and the others were in breach of it.

12.2.3. As Mr Anstee Brown pointed out, the Claimant was very experienced and she accepted that she had had all relevant manual lifting training. She said in cross-examination that a hoist would have been the most appropriate method, but that she didn't use it. It is also the case that the Respondent's Moving and Handling of Customers Policy states that if a resident is unable to stand up themselves

and/or has hit their head (which the Claimant accepted was the case in this incident), '*the ambulance must be called and the customer assessed for injury by the paramedics'* [77]. The Claimant accepted that she had been trained to follow that policy.

12.2.4. We agree with Mr Anstee Brown that regardless of the Claimant's defence of obeying instructions of her team leader, she should have exercised her own duty of care in this case. She is a very experienced and mature person, who, based both on the subject matter of the final written warning (where she was found to have been rude to a manager) and her outspoken evidence in this hearing, would, we consider, be perfectly capable of standing her ground against a team leader, if she thought it appropriate to do so. However, it's quite clear from her evidence throughout this matter that she saw nothing wrong in what she'd done and therefore she saw no reason to dispute the instruction.

12.3. Did the Respondent follow a fair procedure? In this respect, the Claimant said that they did not, due to English being her second language and that while she understood English, she was not comfortable with complex English. She also implied that her ability to understand may have been affected by her hearing, but in fact, in the grounds of appeal she specifically rejects and objects to any idea that she may be deaf, stating that she has only partial hearing loss in one ear, assisted by the use of a hearing aid. We note that this latter issue was not raised in either internal hearing, or in fact, in this hearing before us and therefore we don't consider this matter further. In respect of English, we note that the Respondent's disciplinary policy [83] states that '*if any aspect of the disciplinary procedure causes difficulty on account of a disability, or if assistance is needed due to English not being a colleague's first language, this should be raised to the appointed chair of the hearing, who will make appropriate arrangements.'* It is a statement of the obvious, in our view that '*appropriate arrangements'* can only mean the provision of an interpreter. The Claimant did not avail herself of that facility at any stage in the various interviews or hearings she attended and we note, significantly, nor did she in this hearing. Mr Anstee Brown, in particular, placed stress on her ability to understand, in the appeal hearing and she at no point said she didn't. On one occasion, she did ask him to repeat a point, which he did. Her own statements in the appeal hearing indicated that she was comfortable to proceed, without interpretation. We don't therefore consider that there was any unfairness in the procedure.

12.4. Next, was dismissal in these circumstances with the range of responses of the reasonable employer? We find that it clearly was within the range, for the following reasons:

12.4.1. The Claimant's behaviour had placed a vulnerable resident at risk of further injury.

12.4.2. Her refusal to accept responsibility for her actions indicated that she could, in the future, repeat them.

12.4.3. While she asserted that she was simply obeying her team leader, we consider, as stated by Mr Anstee Brown that '*duty of care trumps all*', particularly bearing in mind her extensive experience.

12.4.4. She had a live final written warning.

12.5. Therefore, as we have found that the dismissal was fair, we do not need to consider the matters of *Polkey*, contributory fault or any alleged breach of the ACAS Code.

13. Direct race/age discrimination. The Claimant has failed to satisfy even the initial burden of proof in respect of these claims and we find therefore that they should be dismissed We refer to our findings above in respect of the fairness of the disciplinary process. There is simply no evidence that the Respondent obliged her to engage in a disciplinary process that was conducted in such a way that she was unable to understand and defend herself. Our findings, as already set out, reject that assertion. Our view is that any discomfort she felt during the disciplinary proceedings, in particular in relation to Mr Bogasz, was down to her indignation at being accused of wrongdoing.

14. Indirect Discrimination. As already found, we consider that the Claimant suffered no detriment in this case, but even if she had, there is no evidence that the Respondent had a PCP of conducting hearings only in English and in fact the policy evidence we have already referred to indicates the opposite. While, in fact, the Respondent conceded in their list of issues that they accepted that there was such a PCP (to our view incorrectly), we are not obliged to accept such a submission, if we consider it contrary to the law and the facts. This principle is set out in **Folkestone Nursing Home Ltd v Patel [2016] UKEAT 0348/15**, where the Employment Appeal Tribunal stated that:

'*an employment tribunal is not bound to act upon and give effect to a concession, if the concession appears to be wrong or arguably wrong. A tribunal is entitled to allow a concession to be withdrawn and to list the matter as one for decision. This is particularly so if it goes to an essential element of the claim …'*.

15. Conclusion. For these reasons, therefore the Claimant's claims of unfair dismissal and race and age discrimination fail and are dismissed.

Employment Judge O'Rourke
London South
Dated 17 February 2021