EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Ms B Mkhize	**v**	Minster Care Group Limited

Heard at: Reading **On:** 4-5 August 2020

Before: Employment Judge Anstis
Mrs R A Watts-Davies
Mrs A Gibson

Appearances:
For the Claimant: Mr O Onibokun (lay representative)
For the Respondent: Mr J Bryan (counsel)

REASONS

INTRODUCTION

1. These are the written reasons for the tribunal's judgment dated 5 August 2020. That judgment was sent to the parties on 9 September 2020 and the claimant sought written reasons on 23 September 2020. I apologise to the parties for delay in production of these written reasons. The request for written reasons was only passed on to me on 23 March 2021. I have not been told why there was such a delay in the referral to me, but have notified the regional employment judge so that he is aware of it and can investigate as he sees fit.

2. The respondent's application for costs was also forwarded to me for the first time on 23 March 2021, and separate directions will be issued in respect of that application.

THE CLAIMS

3. The claimant claims are of unfair dismissal and race discrimination. The individual complaints of direct race discrimination are set out at paragraph 4.4 of the case management order of Employment Judge Hawksworth. The first of these, concerning her suspension, was withdrawn by her representative during this hearing. By her second claim, she also brings a claim of victimisation regarding the referral of her by the respondent to the Nursing and Midwifery Council.

4. The claimant has not attended the hearing. While she was in hospital on Monday 3 August suffering from high blood pressure, she was discharged from hospital that evening. Since then, nothing has been heard of her, and consequently her representative has no explanation of her absence.

5. No application has been made for an adjournment, and it appears to us that the correct way of proceeding in these circumstances is to continue with the hearing. Indeed, neither representative suggested that we should do anything else. This has meant, however, that we have proceeded without receiving any evidence from the claimant. Her representative submitted a written witness statement in her name, but this was not even signed by her and in the absence of any signature we do not think we can properly place any weight on the unsigned statement.

THE FACTS

6. This case arises out of an allegation of malpractice arising in one of the care homes operated by the respondent. The respondent is a large employer, operating a number of care homes across the country. However, at the care home the claimant worked for, the management and administrative team was quite small. It is plainly the case that the issues arising from the incident that gave rise to the claimant's dismissal caused considerable difficulties within the home.

7. The first was that, as we shall see, the malpractice had been uncovered by relatives of a resident. Management at the home had to address the complaints made by the relatives, while at the same time dealing with a number of official agencies in respect of the malpractice, and also dealing with the employee issues that arose out of that: both any disciplinary issues in respect of the employees concerned as well as somehow attempting to maintain staff morale through a very difficult period.

8. We also note that particularly in the case of the claimant, the allegation had been against a very long-standing member of the staff and that the management team had close working relationships with some of those who had been accused of malpractice, including the claimant. It was for this reason that the manager of the home, Frances Payne, quite properly recused herself from making the decision on the claimant's dismissal.

9. The claimant is a qualified nurse. She was in charge of the night work at the respondent's care home. She worked together with a team of three care assistants. Being the nurse in charge of the night shift she was in a responsible position and subject to very limited supervision from management, who would not typically be at the home during the night shift. She had held this position for 14 years. The residents of the care home were vulnerable and elderly individuals.

10. The issues giving rise to this claim started when the family of a resident placed a concealed camera in their relative's room, apparently suspecting that she was not receiving good care. This recorded events in the room over 4-5 days. The family presented management with edited extracts from those

videos stretching to 90 to 120 minutes, which they said showed malpractice and even abuse of their relative.

11. Management immediately regarded this as a serious matter, and the claimant, along with a number of colleagues, was suspended pending further investigation. Although the claimant originally complained that a suspension was a matter of direct race discrimination, that allegation has now been withdrawn.

12. In view of the nature of the allegations, the police and other authorities were alerted by management. On the police deciding that they would be taking no steps, internal disciplinary proceedings were commenced against the claimant and initially at least two or three other colleagues, and later more.

13. The claimant was invited to an investigation meeting to take place on 18 April 2018 and to be conducted by the deputy manager of the home, May Vidal-Payne. There should have been, but was not, any written invitation to this investigation meeting. May Vidal-Payne had been provided with a series of questions that she was to ask the claimant. It is accepted by the respondent that this was the first time Ms Vidal-Payne had been involved in an investigation. It was equally clear to us from her evidence that she was had no real experience or training in such an investigation. She regarded her role as confined to asking the questions and noting down the replies. She should not have been the investigating officer for such serious allegations. We understand that the resources within the home were very stretched in dealing with these difficulties, but the appropriate course of action was for the respondent to bring in people from other homes to conduct the investigation, rather than require somebody who had never carried out an investigation beforehand to do so.

14. It appears from the notes of the investigation hearing that the note taker played a substantial role in the meeting. The claimant's participation in the malpractice was said to be shown by six extracts from the videos, in total lasting around five or six minutes and covering a 10-minute period on one morning. It is common ground that the video was never shown to the claimant. The respondent's witnesses say it was offered but the claimant said it was not necessary to for her to view it. We do not accept the respondent's position on this. No offer for the claimant to view the video is recorded in the relevant minutes. They record "*do you know there is a video*" being said, which is not an offer for the claimant to view the video. We note too that the respondent's ET3 (drafted near to the incidents complained of) say that in any event the video was not available as it was with the police.

15. Following the investigation, the claimant was invited to a formal disciplinary hearing by a letter dated 20 April 2018. The disciplinary hearing was to take place on Monday, 23 April 2018. There is a dispute about whether the letter inviting the claimant to this hearing was ever delivered to her. In the absence of any evidence on this from the claimant we accept the evidence of Frances Payne that she hand delivered the letter to the claimant, and that this is the explanation for the claimant then attending the disciplinary hearing. It is said by Ms Payne that she assumed her admin team had included the

investigation notes within that letter. We find that they did not. There is no reference to them in the letter as we would expect if they had been included. They should have been included and this specifically mentioned in the letter.

16. The notes of both the investigation and disciplinary meeting show that throughout the claimant has accepted that she had not acted correctly in relation to this particular resident. During the course of the investigation meeting, she accepted that she was aware that this particular individual had received only "single-handed care" that is, care from one individual, when "double handed care" was always required – that is, two individuals working with her at once. She accepted that giving single-handed care in this manner was "poor practice". She also accepted that she could be reprimanded for apparently being unaware of one of the care assistants working for her being asleep for four hours. She said that she had been "*in a rush*" and that "*she was rough*". The notes of the investigation meeting record "*she admits she was rough and practising proper poor care that doesn't meet the standards and it won't happen again*". She was asked by May Vidal-Payne whether she wanted to say anything else, but is recorded as saying "*not really*".

17. In the disciplinary hearing, the claimant is recorded as going even further than that. She accepted that her moving and handling of the resident was incorrect, that it was "*negligence on her part*" that she was "*sorry*" and that "*at times we take things easy*". She said she was "*ashamed of herself*". When told she was to be dismissed she said that this: "*she accepts the allegation of gross misconduct and that her contract will be terminated*" and that "*she accepts the decision and understands – she will have to accept it*".

18. It is therefore clear that during the course of the investigation and disciplinary hearing the claimant accepted that she had done wrong, and that what she had done could be considered to be gross misconduct and result in her dismissal.

THE REASON FOR DISMISSAL

19. The dismissing officer was questioned at some length about why she had decided to dismiss the claimant despite her previous good service. The dismissing officer was adamant that any finding of abuse would lead to dismissal of anyone, regardless of their length of service. She said that she could not tolerate continuing to employ somebody who was found to have abused a resident. The claimant's representative referred us to various authorities to the effect that the view of either the claimant or the respondent was not decisive on what was just gross misconduct justify dismissal. However, it is clear to us in this case that the respondent was acting within the range of reasonable responses in concluding that the actions of the claimant had amounted to misconduct justifying dismissal. It is not disputed that this was the real reason for the claimant's dismissal. We find that dismissal in the circumstances where the claimant accepted wrongdoing and was not disputing the allegations against her, was inevitable. It was comfortably within the range of reasonable responses open to the respondent, even given her long service.

THE DISCRIMINATION CLAIMS

20. The claimant raises a number of allegations of discrimination in respect of the conduct of the investigation process and disciplinary process (although not the fact that the process was operated at all, and not her eventual dismissal). We have seen no evidence from which we can conclude that the burden of proof on race discrimination has shifted to the respondent so far as those points are concerned. There is no evidence before us as to how others of different ethnicity had been treated during the course of the disciplinary and investigation process, and nothing from which we could properly conclude that the claimant's treatment was a matter of race discrimination.

THE CLAIMANT'S APPEAL

21. There remains consideration of the claimant's appeal. The claimant was told in the disciplinary hearing on 23 April 2018 that she was being dismissed. There was no mention of an appeal during this meeting. This decision was followed up in a letter dated 23 April confirming her dismissal with effect on 23 April, and saying that "*you have the right to appeal against … The decision and should you wish to do so you should write to Colin Fairbrother, operations director, within five working days"*.

22. It is not in dispute that the claimant only received this letter on 26 April. She then wrote to Mr Fairbrother by email on 1 May, setting out 13 separate grounds of appeal, and raising for the first time allegations of race discrimination.

23. In his witness statement, Mr Fairbrother said that he had not responded to this appeal, because "*I found it very surprising that she had appealed the decision to dismiss her*" and "*I did not take the appeal seriously and did not respond*". In his oral evidence he added to this that the appeal had been received outside the five-day time limit permitted.

24. We were not referred to any policy document in which this five-day period was referred to, nor in which it was made clear whether the five days ran from the date of the decision, the date of the letter giving the decision or the date the letter was received. On the claimant's argument, she had taken it to be five days from the date the letter was received. The claimant's representative provided us with a number of authorities relevant to the effective date of termination suggesting that documents only took effect on receipt. We have some doubts about whether these can be read across to the question of the right of appeal, but it does seem to us that there are very real dangers if the respondent says that this is to be five working days from the date the letter was sent. In the first place, we do not know how the letters will be sent – whether by first or by second class. It is not disputed and in this case the letter appears to have taken three days to reach the claimant, allowing only two days then for an appeal on the respondent's case. That seems to us to be highly unsatisfactory. If the respondent is to impose such a short time limit it must make it very clear to the claimant. We find that the claimant was entitled to consider that the five days ran from the date of

receipt of the letter. In any event, we find the real reason why Mr Fairbrother did not address the appeal was that he considered it to be not serious and, as he says in his witness statement "*I assume the claimant would be bound to let the matter drop.*"

25. The ACAS code of practice on discipline and grievance procedures requires that an employee is given the opportunity to appeal against their dismissal. In this case, we find that the claimant was given no meaningful right to appeal. Regardless of the time the appeal was received, Mr Fairbrother's response would have been the same – it was ridiculous and would not be considered by him, nor even responded to. We consider this in the circumstances to be an unreasonable failure by the respondent to comply with the ACAS code of practice on disciplinary and grievance procedures. This is a matter we can and do take into account when considering the fairness of the dismissal.

26. While the claimant's grounds of appeal were surprising, given the attitude she had previously shown in the meetings, this was all the more reason for Mr Fairbrother to take the appeal seriously and investigate whether there was anything to it. We find Mr Fairbrother consciously took a risk in not dealing with the appeal, hoping that the claimant would take matters no further. As it is, the claimant has taken matters further. We find that the fact that the claimant was not given an appeal is sufficient to make her dismissal unfair. It is a fundamental point that individuals should be allowed appeals, particularly in disciplinary situations, and to ignore an appeal on the basis that it is not to be taken seriously is very poor practice.

THE REMEDY FOR UNFAIR DISMISSAL

27. In the event that we found that the claimant was unfairly dismissed, Mr Bryan urges us to make 100% deduction from both the basic and compensatory award for compensatory fault, as well as considering a deduction under the rule in Polkey.

28. It is inevitable that in these circumstances we will find that the claimant was guilty of the misconduct she was accused of, and that, in fact, her appeal did not have any merit and, if it had been heard by Mr Fairbrother, would have been rejected by him. The claimant has accepted all along that she did wrong, and we do not consider into the circumstances it would be just and equitable for her to receive any award of compensation, either through a basic or a compensatory award. There will be a 100% deduction for contributory fault from both the basic and the compensatory award.

THE VICTIMISATION CLAIM

29. Finally, the claimant brings a claim of victimisation. This relates to a complaint lodged with the NMC about her actions, which was only lodged in October 2019, many months after the events in question. The claimant says that this is an act of victimisation – retaliation for her having bought her employment tribunal claim. In support of this she relies on some evidence from another nursing home as to discussions that we had with the manager

of her nursing home. We do not see anything in this to suggest that the referral was an act of victimisation. It is referred to as a likelihood as early as the investigation and disciplinary hearings. There were many agencies that had to be reported to as a result of these problems. We accept the evidence we have heard from the respondent that they simply forgot or omitted to make the final referral to the NMC. They reminded of this when preparing their disclosure for the hearing. This was the reason why the disclosure was eventually made, and it is not a matter of victimisation.

CONCLUSION ON UNFAIR DISMISSAL

30. The claimant was undoubtedly in the wrong in the circumstances, but we have identified in our decision several failures in the procedure that the respondent operated. The one that we have found goes to the fairness of the dismissal is the failure to consider the claimant's appeal, but the other failures we have identified are of themselves substantial, and do not reflect well on the respondent. We accept that the respondent was faced with a difficult position, but the difficult circumstances in which this matter arose make it all the more important that proper procedures are followed, and we have found that the respondent was a sufficiently large employer to have the resources to have dealt with this situation far better than it did.

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Employment Judge Anstis
30 March 2021

Sent to the parties on: 22/04/2021

For the Tribunal Office