EMPLOYMENT TRIBUNALS

Claimant: Miss S M Carlyon

Respondent: Connor Associates Limited

HELD AT: Manchester **ON:** 14 June 2021

BEFORE: Employment Judge P Britton (sitting alone)

REPRESENTATION:

Claimant: Mr M Carylon, claimant's father
Respondent: Mr C Bennison, Solicitor

JUDGMENT

The claim for breach of contract (failure to pay notice) succeeds. I also make an uplift by way of failure to comply with the ACAS Code of Practice of 20% pursuant to Section 207A of TULR(C)A 1992. This means I order the Respondent to pay the Claimant by way of damages for breach of contract (failure to pay notice pay) the total sum of £297.82. This, for the avoidance of doubt, is the net sum.

REASONS

Introduction

1. This is a claim for breach of contract (failure to pay notice pay) arising out of the dismissal of the Claimant by the Respondent. It is so confined because the Claimant was employed by the Respondent as a children's residential support worker only between 9 November 2019 and her summary dismissal for gross misconduct on 12 March 2020. It is not a claim brought under any of the provisions that mean that two years' qualifying service is not needed to bring a claim for unfair dismissal. That is why it is confined to a breach of contract claim, and that of course is limited in terms

of the scope of what the Tribunal can do by reason of the Employment Tribunals Act of 1996 cross-referenced to the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. Put simply, I am confined essentially to being able to award, if appropriate, the pay in lieu of notice that was not paid because it was a summary dismissal. Issues such as awarding stigma damages or personal injury arising out of a breach of contract claim are not within the jurisdiction of the employment tribunal.

2. Essentially why the Claimant is here is because through the vehicle of her claim for breach of contract she seeks to get from the Tribunal a finding that she was wrongfully dismissed. That is important to her because this was her first job post-graduating from Edge Hill University in 2019. She aspired to a career as a Social Worker and as at that time she could not study for a Masters she decided to gain experience within the field, hence why she came to be employed by the Respondent. She was 22 when she obtained the employment.

Findings of Fact

3. In reaching my decision I have had before me a bundle of documents[1]. I have heard the sworn evidence of Mrs Sabe Connor (SC) for the Respondent. She is the Responsible Individual and Director of Hollywell Childrens Services which is the trading name of the Respondent. Then I heard from the Claimant also under oath. The evidence in chief of each was by way of a written statement.

4. The Respondent operates care homes for young person under 18. The service is very one-to-one in terms of the nature of the clients that it looks after. I am well aware of this kind of undertaking from previous cases I have undertaken. So, what we are dealing with – and in this case in comes the client BN – is disturbed young people under the age of 18 who are really at the place of last resort, them being unable to be cared for through such as fostering; them having often been expelled from school; them having already obtained a criminal record; drugs abuse etc. So, these are very difficult young people who require intensive residential support, often in the most trying of circumstances. Thus, it is not a job for the inexperienced or faint-hearted, and the Claimant was of course very new to the role. And the Respondent has clearly got a very high level of safeguarding responsibility. It comes under the auspices, for supervisory purposes, of Ofsted, and in terms of the outcome in that respect, inter alia the impact of the incident that I am going to come to on 23 February 2020. To put it at its simplest, Ofsted came-a-calling. It found things seriously lacking within the regime of the Respondent. This was not just over the episode with BN on 23 February 2020 but, as is self-evident from their visits on 18 March and 1 July and the highly critical report of 6 July, it was wider. Essentially what they revealed was widespread shortcomings at that time by the Respondent in terms of safeguarding, training of staff, quality and numbers of staff, i.e. the gamut. As a consequence, the Respondent shut down its operations to put its house in order. By the end of 2020 it had satisfied Ofsted that it had done so and thus re-commenced operations.

5. So, it is also self-evident to me in this case that the responsibility on the Respondent for the safeguarding of these difficult young persons is very high indeed, and that obviously should cascade down to its staff, but there were these

[1] I refer to any documents therein with the prefix Bp.

shortcomings. The Claimant had received some training but I do not see very much of it in the bundle that I have got before me. But she had had two or three supervisions by the time of what happened, and she was doing well.

6. Into the equation comes her Regional Manager for the purposes of this case, namely Harry Armer (HA). By the time he came to write his final statement on 23 June 2020 he was no longer in this employ. He has not given evidence before me. The line manager who dealt with matters at the material time, namely Sylvester Rukani (SK), is also no longer in the employ of the Respondent. Hence he also has not given evidence. Put at its simplest, on 23 February 2020 BN had been AWOL since 21 February from where she should have been residing in the care of the Respondent, namely The Grange. It seems that the Respondent thought that she was most likely at her sister's, but again I am not much clearer about that after a lengthy hearing today. As to what was going on to track down BN before the 23 February , I am again none the wiser.

7. The Claimant came on duty on that day as the only care worker who would be at The Grange; responsible for BN, if she showed up, on a one-to-one basis. She started duty at 8:00 am and she was scheduled to work through to hand-over at approximately 8:00 pm. She left the premises at The Grange at about 3:00 pm and took the two-minute walk round to the sister home, so to speak, namely Firtrees of the Respondent in the locale where another Social Worker on duty, Alex. She was looking after another young person. I can piece together that the Claimant went round to get to know the other young person more than she had already, her having only had a fleeting visit previously. She did not go back to The Grange until about 8:00 pm. Unfortunately, in the interim, about twenty minutes before that, BN had returned. The door was locked and so BN, having shouted loudly, which roused the neighbours, then began to bang loudly on the door, which led those neighbours to be more concerned, and then she managed to barge the door in, and she got inside. On the evidence that I have before me, and there are several contemporaneous reports, including what the Claimant and two colleagues had to say that night, Alex and the Claimant may well have left shortly after they got to the premises. Their colleagues who remained witnessed extremely violent behaviour by BN: lots of damage done, serious threats of violence. The police had to become involved. The events left one of the staff who was present so traumatised by the experience that she left the employment.

8. And because, of course, the police were involved in this matter and given the nature of BN, who was not unknown to them or social services, that engaged then LADO[2], and the requirement of the Respondent to report said matter to Ofsted, who found out swiftly anyway.

9. As a result of that we get to what happened. The Claimant had a purported supervision with SK on 26 February. It was headed 'Supervision Record'. The Claimant never signed it. In fact it was not a supervision at all; it was actually, although I do not think she knew it, in part a post mortem on what had happened on 23rd, as to which see Agenda item 1, Bp40. Therein the Claimant explained that "she was instructed by HA that she could go to Firtrees when there were no children at The Grange". She went on to say that she was traumatised by the incident and that she

[2] Local Authority Designated Officer under the statutory safeguarding regime.

herself would find it difficult to work, perhaps, with BN ever again, and that she had not had enough training to deal with challenging behaviours. But of course the latter point is quite irrelevant. This was not about challenging behaviour, it was about her not being on duty at The Grange at the material time. That is a core point. But the Claimant was never informed this was a disciplinary investigation. SK commenced an investigation report on 29 February. He set out what *inter alia* the duties of the Claimant were, namely:

(i) To complete hourly welfare checks on the young person by phone;
(ii) To record outcomes of those welfare checks;
(iii) To report any concerns to the on-call worker/Manager;
(iv) To complete any other audit records required in the home as the only person on duty.

He recorded that when talking to the Claimant, so that is more than can be seen in the supervision record, that she had told him that "Harry (Duty Manager) had informed her that she should go to Firtrees and "chill out there".

10. He records 'On 2 March I asked Harry in regards to authorising SC to "chill out at Firtree House when there were no young people at Grange Place". Harry stated that he told SC that she could go to the Firtrees to introduce herself to a new client who had her own support team'.

11. The point that SK was making was that even if he had so told her, the Claimant had failed in her duty of care to the young person. I stop there. At that stage, no statement was taken from HA. Cross-reference and on 6 March Michaela Hardy, another carer on the team, had spoken to SC, who was the overall director of the business, which employs about 180 people. She recorded:

'My understanding was that the manager Harry had mentioned to all staff and said when we are quiet at The Grange staff are allowed to "nip" when they have a spare five minutes to walk to Firtrees and say hello and introduce themselves to the new young person, and then staff must return back to The Grange.

I was not on duty that day but this is what I have been told'.

12. She does not say that she was told that by HA. Was this second-hand? Should not HA, in any event, have been recording in writing what he was allowing these staff to do because of the implications. To go round and see the new young person for five minutes, maybe even thirty, for a cup of tea is one thing; to leave them with the understanding, which was the case of the Claimant, that they could stay there longer than that as long as they undertook checks from time to time, is a wholly different matter. Suffice it to say that thereafter HA contradicted himself on several occasions, and the final explanation he gave on 23 June 2020, which was after the outcome of the appeal decision, was "As discussed with Sylvester on 3 March 2020 I confirm I did not instruct Sophie to go to the Firtrees property." Well that is, of course, a complete contradiction to what SK recorded and to which I have referred. What it means is that from the point of view of the Respondent they were faced with evidence from HA which was unreliable.

12. My other big concern is this. Although the Claimant did not have two years' qualifying service and the Respondent has a discretion as to whether it uses the full extent of its disciplinary procedures, which are before me, in the case of an employee with such short service, on the other hand, it does not say they do not have to go down that route at all, and of course I am well aware of the ACAS Code of Practice. Now of course an employer who has got an employee who has not got two years' qualifying service can decide to ignore the ACAS Code of Practice and for that read their own disciplinary process. But of course they do that at their peril if, as a result, they do not cover things that they fairly should have done and which then leads them, as in this case, to be in the position that they are now. Why do I say that? Because the Claimant was never invited apropos the procedures by SK to any form of disciplinary investigation meeting. She was never supplied with any disciplinary pack if he ever got one, and there is no evidence on the file as I have got it of any witness statements taken by him. I assume he got the statement that MH gave to Sabe Connor, but I am not sure. He most certainly did not interview Alex, from the paperwork that I have got. Indeed, it would appear that the first statement in the bundle from her was obtained on 14 July 2020 at Bp 78. Why does that matter? It is because the Claimant was really saying from early on that she thought she could stay round at Fir Trees because HA had told her, given that BN had gone AWOL; but that she had undertaken regular checking during that day by, for instance, seeking to telephone BN or otherwise looking at the CCTV at Firtrees, which appears to link through on the screens to the CCTV at The Grange. Did the Respondent check that out? I do not know what the entire log says, I have not got it. I do know that there is an entry contemporaneously made in the log for 23 February, and it seems to me recorded by the Claimant which is at Bp42a. Under "behaviours" it says: 'Answered a couple of welfare checks'. Well, that was never followed up with the Claimant. Also not pursued via further investigation was that she went out with Alex and the YP in the staff a car inter alia looking for NB.

13. Suffice it to say that I come out of that part of the exercise with the fact that the Claimant was dismissed summarily by SK, him having completed his investigation report, on 10 March and by letter of 11 March[3]. He decided that it was gross misconduct, i.e. she had neglected her duties, and he said, *'Even if Harry had informed you to 'chill out at Firtrees' you failed in your duty to care to the young person's wellbeing. I have checked phone records and found that you had not completed welfare checks hour by hour as you should have. I do not understand why you visited Firtrees for so long and did not return to Grange Place .. for more than five hours in that time no welfare checks took place'.*

14. Well, I do not have before me the evidence of SK to justify that he undertook these checks. I do not have the phone logs. If I had, and more importantly if SK had produced them to the Claimant, we might not be here. But he did not. What it means is that the disciplinary investigation process in this matter is fraught with problems for the Respondent. To put it simply, it is inadequate in a situation where it has the potential to be career-threatening for the Claimant at the start of her career. The Claimant had a right of appeal – that is in the letter – and she exercised it. The main thrust of her appeal was, first of all, that she disagreed with SK (as to which see Bp48 para 3) because she says that she did record the phone call checks with BN and that

[3] Bp46

she looked at the time as she had recorded it on the welfare check sheets and log sheets. So, a total conflict with SK. Second, that HA did not say she could go to "chill out at Firtrees". Her next sentence or so is muddled. From her evidence today, I think she meant to say 'he just said I could go round there and see the new resident but without saying I had to stay only a short period of time'. She had not of course seen Michaela's statement. But as to this confusion it would, in any event, have been cleared up had she been formally interviewed by SK. But then it came back to how she had carried out her checks on the phone and using both Firtree and Grange mobile phones and 'As agreed by Harry I remained at Firtrees and carried out the necessary welfare checks'. She also helped clean Firtrees And she set out all of her explanation fully in Appendix No. 2 to her grounds of appeal entitled 'Statement of Events'. In those grounds she also referred to that when she went round to Firtrees they had what I might describe as the only staff car, so it could be used to take out a resident , for instance shopping; and thus how she and the other care worker – which would be, I gather, Alex – with the young person residing at Firtrees went out in the car for that purpose but also visited the locale where they thought the young person BN might be, but without success. She listed the times she contacted BN and *inter alia* set out that it ended up in a final call with BN telling her she was not going to say if she was coming back to the Grange that night or as to whether she going to attend school, and then put the phone down. So, the Claimant remained at Firtrees until she went back for what in effect would be shift hand-over, only to find the mayhem that I have described. So, the thrust of her appeal was essentially that:

(a) 'I thought I had permission from HA'
(b) 'You have failed to check out that I took all these steps so it is wrong to say that I did not'; and
(c) 'I had no reason to believe that BN would in fact return that night'.

So those are the grounds of the appeal. They are primarily, therefore, forensic.

16.In terms of what I now come to, nowhere in those grounds did the Claimant say words to the effect of: 'but I have thought about it and I realise that I ought to have used my common sense and gone back earlier because with such an unpredictable young person you never know, she might turn up and obviously there would have to be someone there with the safeguarding duties to let her in to avoid the kind of problems that happened. "

15. The appeal hearing before Sabe Connor (SC) took place on 16 April 2020. There was a minute-taker, Geli Lak. The meeting started at 10:00 am. From the minutes before me I cannot see when it ended, but I am informed by the parties that this was between 11:30 and 11:45. The Claimant's father listened in. The Hearing was held by either telephone, says the Claimant, or WhatsApp, says SC. There is a conflict. I do not think it matters to me because I have got the minutes of the meeting. The Claimant started off talking about the induction, shortcomings in training and matters of that nature. But SC, paraphrased was saying 'Well you weren't dismissed for training shortcomings etc, let's focus on what happened on 23 February'. And it got back to Harry Armer (HA). In those minutes SA is recorded as stating that on the issue of giving permission to go to Firtree HA had been questioned and had absolutely denied doing so. But SC tells me today that this is not what the minutes ought to have said. He did not deny saying that he told the Claimant that she could go and "chill out"

round at Firtrees or go and visit the new young person. But then we are back to what if anything did he say about the intended duration of the visit or the need to regularly check on the whereabouts of BN.? And there are of course the contradictions. Finally why is it that the minutes record such a stark denial viz HA? The evidence on the issue for the Respondent is all over the place and thus lacks credibility. This is the problem with the appeal hearing. – it is back to the evidence of our Harry.

16. The meeting became difficult. SB accused the Claimant of being rude and disrespectful (see bottom of Bp69). The Claimant, summarised, retorted :'No I'm not, you're not listening to me and I'm trying to get across my point about the issue of Harry, the records that would show what I was trying to do, and the procedural unfairness points from the previous part of the process'. What it gets to is this, because again we get the problem that SC was stridently, (Bp70), repeating that HA was saying he gave her no permission ie not that he gave her permission but limited to say five minutes. She did not refer to Michaela and her statement. If SC had spoken, as she tells me, to Alex, she made no reference to her, nor to having spoken to anybody else. In this respect I repeat that I was not impressed by SC's evidence.

17. However, SC also told me that she was looking for the Claimant to show ownership. To accept her own shortcomings on the issue given her intelligence and of course with career aspirations to be a social worker. Had she demonstrated insight, then SC would have overturned the dismissal. It is a problem. I think the Claimant was holding her own against SC. In her stance she was very much focussing on the forensic and procedural issues. I suspect with significant input from her father. Whilst SC did not spell out in words of one syllable, whether the Claimant now accepted with hindsight that she was also responsible for what had happened, nevertheless, at the end of the meeting, she asked the Claimant if she had got anything else and the latter stated she was looking for an outcome from this appeal whereby the charge of the gross misconduct was withdrawn and she was reinstated. SC ended with saying "If that is all?". The Claimant said that she had got nothing further to add. Her father, who had wanted to take part because the Claimant was not in a trade union, had not received any reply to his request, so he simply listened in. Perhaps if he had been present the Claimant would have taken the hint. But conversely even if today she may express some hindsight, that is not what came across at the appeal hearing and wherein as I have now made clear she held her own against SC.

18. SC dismissed the appeal and upheld the decision to summarily dismiss without notice pay because this was a severe dereliction of duty without any demonstration of remorse or regret even with the benefit of hindsight. Thus, the Respondent, as made plain by SC today, had lost all trust and confidence in the Claimant.

Application of those findings to my decision

19. As to whether the decision to dismiss for gross misconduct and without notice pay constituted a wrongful dismissal and thus breach of contract by the Respondent is an objective test. I do not deal with it under the range of reasonable responses test for an unfair dismissal. The test is whether on the balance of probabilities I am persuaded, with the burden of proof upon the Respondent, that the Claimant committed a fundamental breach of the implied contractual term of trust and confidence by an act of gross misconduct with no mitigation worthy of the name, so to

speak, which meant that the Respondent was entitled to treat the contract of employment as repudiated by her and not pay her notice money.

20. I have no doubt that what happened on 23 February 2020 was extremely serious. I have also no doubt that there were considerable failings. I think the Claimant as per the Respondent 'should have used her common sense', but she is after all only 22 and this was her first job. I also think, on the other hand, that HA should have been "grilled", so to speak, much more firmly by the Respondent to establish precisely what he did say and why he did not spell it out in writing. I also think that the Respondent did not sufficiently investigate the logs of phone calls and other records that there might have been and interview Alex at the material time, rather than rely on a statement from her sometime later which is supportive of the Respondent in terms of really suggesting that the Claimant should go back to The Grange earlier than she did. But there are no questions that I have before me as to what she was asked to answer. I do not know from her statement as to whether they did take the car out at some stage in the afternoon with the young person at the Firtrees and whether they did try to find BN. Therefore it is not nearly sufficient to belatedly support summarily dismissal.

21. So what it means – and I have thought very long and hard about this – is that I conclude that the Respondent does not satisfy me on a balance of probabilities that the Claimant's actions, given the context as I have now spelt it out, did constitute a fundamental breach of contract. There were shortcomings by management (and in particular HA) and also in terms of the investigation, and I do not think it was made clear to the Claimant that they were actually looking for the ownership that SC relies upon. So, I have therefore decided that I find that the Claimant did not commit so fundamental an act of gross misconduct as to mean that she was not entitled to notice pay. There were shortcomings by her but they were not so serious as to mean she should not have received that entitlement. Contractually it is only one week's pay. The parties are agreed that this is £248.19 net.

22. I now come on to Section 207A of TULR(C)A 1992. That is because I have already referred to the ACAS Code of Practice and which in effect requires that in this particular type of scenario there ought to be – and it really mirrors a case called **British Home Stores v Burchell**[4] which is where the ACAS Code of Practice comes from – that there should be a full investigation commensurate with the gravity of the offence, including the interviewing of employees material to events and taking statements from them; thence giving the employee an opportunity to give their explanation with the right to be accompanied by a colleague or trade union official; thence if there is a case to answer, to be invited to a disciplinary hearing by letter setting out the allegations, the evidence to be relied upon, the person who is going to hear the disciplinary, who should be different from the investigator, and usually supply the disciplinary evidence relied upon, even if statements are anonymised. Stopping there, none of that happened in terms of the disciplinary process. Then I come to the appeal. An appeal hearing, apropos, as Mr Bennison said, **Taylor v OCR Group Ltd**[5], can cure the defects of the first round. In this case there was an invitation to have an appeal, the Claimant set out her grounds and she had an appeal heard by SC. The deficiencies

[4] 1980 ICR 303, EAT
[5] 2006 ICR 1602, CA

of the first stage of this process, i.e. the disciplinary hearing, were not cured by the appeal hearing for reasons which I have gone to and given that this is an organisation which I understand employs about 180 people. The problem I then have is that if the Respondent did not think it needed to go through a process because the Claimant had not been there for long, why offer a right of appeal? It is a non sequitur. Therefore, I have decided in those circumstances that it is just and equitable in all the circumstances to make an increase in the award. I can increase by up to 25%, but given the appeal took place, which in that sense to a limited extent mitigates the shortcoming, I limit the overall award by way of uplift to 20%. That equals £49.63. That makes a total award for the breach of contract of £297.82.

23. For the avoidance of doubt, I have no jurisdiction to order that the Respondent gives the Claimant a reference, although I would hope that coming out of today it would at least be prepared to give her a standard reference.

24. I cannot order it to pay her any other monies for the reasons I have gone to.

Employment Judge P Britton
Date: 28 June 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
29 June 2021

FOR THE TRIBUNAL OFFICE

Note

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

DC

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2405916/2020**

Name of case: **Miss S M Carlyon** v **Connor Associates Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 29 June 2021

"the calculation day" is: 30 June 2021

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.