



EMPLOYMENT TRIBUNALS

Claimant: Mr A Mohanan

Respondent: HC-One Oval Ltd

Heard at: Croydon Employment Tribunal by cloud video platform
On: 20 to 21 April 2021

Before: Employment Judge Nash

Representation

Claimant: Mr Blitz of counsel

Respondent: Ms Young, solicitor

JUDGMENT having been sent to the parties 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:

REASONS

1. Following ACAS early conciliation from 11 January 2019 to 25 December 2019, the claimant presented his application to the tribunal on 22 January 2020.
2. There was a preliminary hearing on 12 November 2020 after which the claimant provided further and better particulars of the claim. There was no amended ET3.
3. At the beginning of this hearing there was an issue as to the correct constitution of the employment tribunal. The complaints had been listed as protected disclosure and race discrimination, but it transpired rapidly that this was not the case. The only complaint was of unfair dismissal under section 98 Employment Rights Act. Accordingly, as there was no request by either party for the Judge to sit with members, the tribunal proceeded on a judge alone basis.
4. In respect of witnesses, for the claimant the tribunal heard from the claimant himself plus Ms George and Ms Anthony. From the respondent, the tribunal heard from Mr Catterwell, an area director, Ms Craig an area quality director who heard the appeal, and Ms Jacks from HR. All witnesses had witness statements. The tribunal had sight of an agreed bundle.

The Claims

5. The only complaint was for so-called ordinary unfair dismissal under section 98 of the Employment Rights Act 1996.

The Issues

6. With the parties, the tribunal agreed the issues as follows:-

- i. What was the reason for dismissal?

The respondent contended that this was not pleaded in the ET1. Accordingly, the tribunal considered the drafting of both the ET1 and the further and better particulars. It reminded itself of the overriding objective and the well-established case law that a tribunal should avoid formality. An employment tribunal claim form, is not to be judged to the same standards as a High Court pleading. The tribunal concluded that the case was sufficiently pleaded for the Respondent to be on notice of the claimant's case and there was no prejudice to it in this respect. In any event, the burden was on the respondent to show the reason for dismissal.

The respondent relied on misconduct as a potentially fair reason for dismissal.

- ii. Was the dismissal procedurally fair including whether the respondent had passed the so-called Burchell test?
 - iii. If the dismissal was procedurally unfair, should there be a so-called Polkey deduction? That is, could and would the respondent have dismissed the claimant fairly in any event?
 - iv. Sanction. That is did the decision to dismiss the claimant come within a reasonable range of responses available to the respondent in the circumstances.
 - v. If the dismissal was unfair, to what if any extent did the claimant contribute to his dismissal?
 - vi. To what if any extent should any adjustment be made to any award due to any failure to comply with the ACAS code.
7. At the beginning of the hearing the claimant applied to strike out the response on the basis that the respondent was calling no evidence on matters on which it bore the legal burden. In effect, the respondent was not calling the individual who took the decision to dismiss or the investigating officer. Accordingly, the claimant contended that it had no reasonable prospect of discharging the burden upon it.
 8. The respondent objected stating that it would be introducing evidence and would succeed in discharging the burden.

9. The tribunal applied the overriding objective. It reminded itself that the test for a strike out, without hearing evidence, is whether there is no reasonable prospect of success. It was trite case law that in fact-sensitive cases, a tribunal should be very wary of striking out a case before hearing evidence.
10. Accordingly, the tribunal concluded that it was for the tribunal to decide if the respondent could discharge the burden upon it and this would be determined by hearing evidence. The tribunal refused the strike out application.

The Facts

11. The respondent runs a network of about 300 care homes employing about 14,000 staff. The claimant started work on the 30 May 2010 as a carer and was later promoted. He later qualified as a registered nurse and was working as a registered nurse at the time of dismissal.
12. The care home (“the home”) at which he worked cared for vulnerable elderly residents including those with dementia. It was subject to the regulatory requirements of the Care Quality Commission.
13. The home had a Missing Residents Policy setting out what should be done if any resident went missing. Firstly, staff were to search the premises. There should then quickly be a so-called second sweep. Once established that the resident was not on the premises, local streets should be searched. A search should have a time-frame, for instance, fifteen minutes. The Area Quality Director or Area Director should be informed if the initial search did not bear fruit.
14. In its disciplinary procedures, the respondent classed the falsification of records as gross misconduct. There was no dispute before the tribunal that records of care in such a home were crucial and the respondent had to be able to rely upon these records.
15. The tribunal now turns to the 20 July incident which led to dismissal. The claimant was on duty at the home and was the person in charge in his unit. There was a resident (referred to as ‘the resident’) who, due to his care needs, was being observed every fifteen minutes. A care assistant (referred to as “H”) was assigned to carry out these fifteen-minute observations and record them contemporaneously.
16. At around 12.27pm, although the precise time was unclear, the police telephoned the home to say that they had found a gentleman with dementia at a bus station trying to get on a coach. They wanted to know if this was a resident of the home.
17. The claimant, after some enquiries, confirmed that this gentleman was, indeed, a resident of the home – the resident who was on 15 minute observation. The police brought the resident back to the home at around 12.40pm or perhaps a little later. At 12.50pm the claimant called Ms Anthony, the on-call manager, reporting that the resident had left the home and the police had found somebody with the name of G--- (the first name of the resident).

18. The claimant then informed the resident's daughter who happened to be at the home at the time. He also spoke to Mr Catterwell who was present at the home on some form of inspection. There was some disagreement as to whether he informed Mr Catterwell that he had spoken to the police.
19. However, there was no dispute that the claimant raised concerns to Mr Catterwell about staffing including long-standing concerns about under-staffing at the home and the under-performance of some staff. Mr Catterwell logged the claimant's comments on the respondent's system.
20. Both Ms Anthony and Ms George agreed with the claimant that these concerns had been raised with management on a number of previous occasions. On the balance of probabilities, on the evidence of three witnesses and the well-known difficulties in the recruitment and retention of staff in the care home sector, the tribunal accepted that such concerns had been raised prior to 20 July.
21. The claimant then, or around this time, completed an incident form in respect of the claimant going missing as follows:-

The resident had last been seen at 12.00pm. He had left the home at 12.15pm possibly through the kitchen and had been found at the station. The police had phoned and said that they had found the resident outside and brought him back around 12.40pm. He was missing for about 20-25 minutes.

22. The incident report was not timed. According to the form, the resident's daughter had been informed at 1pm, so it was highly likely that the form was completed after that time.
23. Ms Condie the home manager started her investigation on 23 July. She was not before the tribunal. According to her investigation report, she came in to work on 22 July to discover the incident, of which she was previously unaware. Her investigation report stated that she spoke to the resident's daughter on 23 July. The daughter said that she had been visiting the home on 20 July. The claimant had told her that he was about to call her to say that the resident had gone missing, however the resident had now been found by the police. Ms Condie recorded the daughter as being suspicious of the claimant's account.
24. Ms Condie also recorded that

"I was able to get confirmation that a coach driver had phoned the police at 11.54am after finding the resident confused at the station. The police called the home at about, perhaps, 12.27pm".
25. According to the respondent, Ms Condie was concerned because the resident's being found outside at 11.54am did not fit with his leaving the home at 12.15pm. The tribunal accepted that this was the case on the balance of probabilities as it was an obvious issue.
26. Ms Condie's investigation was set out at page 54. She reviewed the contemporaneous incident report and the resident's fifteen-minute observation reports. She interviewed the staff on duty, the call manager, the

resident's daughter and spoke to what was described as 101. It was assumed although it was not said expressly that 101 provided the police timings.

27. The same day she met for the first time with H. The minutes of the meeting record H saying that she did not record anything for the resident's fifteen-minute observation notes. The claimant told her to fill in the remaining fifteen-minute observations. *"He sat with me and told me what to write"*, she said.
28. Ms Condie asked H if she thought that writing down what she did not see was wrong. H said that she just wrote what she was told by the claimant. H said that the 12.00pm entry was accurate. Ms Condie asked how the police could have called saying the resident was outside at 11.54am if H saw the resident in the home at 12.00pm. She told H that she needed to be honest.
29. H then said that she had asked the claimant what she needed to write in the records, and that contrary to her written observations, at 11.45am and 12pm she had not seen the resident. The claimant had told her to write that at 12.15pm the resident was missing. When she wrote at 12.30pm that she was searching the building, this was untrue. She was told to write that by the claimant. She did not see the resident when he was brought back by the police at 12.45pm. Her record that she saw him at 1.00pm, however, was true. She said that there was a widespread problem because of workload that the observation records were not completed on time.
30. On 24 July Ms Condie had her first investigation meeting with the claimant. The claimant told her that he had started looking for the resident at 12.00pm. He did not refer to his asking H - who was responsible for the fifteen-minute observations – if she knew where the resident was. Nor did he say that he had checked the 15 minute observation book. He said that he put 12.15pm as the time the resident left the home because that was when he formed a certain belief that the resident was missing. The claimant said that he did not read H's observation notes because he did not have time.
31. Ms Condie asked the claimant why he started looking for the resident at 12.00pm when the incident form said that the resident had left the home at 12.15pm. The claimant said that he concluded that the resident was, definitely, missing at 12.15pm. **He did not say that it was H's 15 minute observation notes which led him to his view that 12.15pm was the time that he realised that the resident was missing.**
32. The claimant said that H's account was a misunderstanding due to her poor English. He denied in terms telling her to falsify records.
33. Ms Condie gave the claimant a pre-written suspension letter suspending him with immediate effect. The charges were that:-
 - i. A resident had left the building and the claimant was unaware until called by police;
 - ii. He had falsified an incident report;
 - iii. He had instructed a care assistant to falsify observation records and

- iv. He had instructed a care assistant not to provide one-to-one care for a resident.
34. He was suspended on full pay.
35. Ms Condie met again with H later that day. She told her that the claimant denied telling her, H, what to write. Ms Condie asked H if there any misunderstanding. H said that the claimant was lying and according to the notes became very upset.
36. Ms Condie took a statement from Ms George who was another staff member at the home on 22 July. She also took a statement from Ms Anthony, the on-call manager. Ms Anthony said that the claimant had called her at 12.50pm. He had told her that he was surprised and shocked when he was informed that the resident was with the police, and that the resident was missing for 20-25 minutes.
37. Ms Condie took a number of other statements from staff at the home including from:-
 - Ms Pillado who said that the claimant asked her at about 12.00pm if she had seen the resident because the police had called to say that the resident was at the station;
 - Mr Barnes who said the claimant had asked if he had seen the resident because he (the claimant) had just received a call from the police;
 - Mr Kennedy who said that the claimant told him that the resident had come out through the kitchen. When Mr Kennedy said that he could not have done so, this led to some tension between him and the claimant.
 - Mr O'Connor who said that Ms Pillado asked at 12.15pm if they had seen the resident.
38. Ms Condie summarised her findings of the investigation at page 56 and recommended that the matter proceed to a disciplinary.
39. Ms Burgess was tasked with the disciplinary hearing. She was not called by the respondent. The tribunal had sight of the notes from the disciplinary hearing at page 96-100.
40. At the disciplinary hearing, the claimant was accompanied by his union representative. There was a note taker whose notes were not verbatim. The claimant and his union representative made some amendments to the minutes after the meeting.
41. The respondent did not call any witnesses to the disciplinary hearing. The claimant explained that he had a recording of a conversation he had had about the incident with a desk sergeant at the relevant police station. The recording was played at the disciplinary hearing. The tribunal had sight of an agreed transcript of this recording at page 103.

42. The claimant told the tribunal that he initiated this conversation by telling the desk sergeant that he worked for the home; he did not suggest that he explained that he was under investigation by the home. The claimant said that the recording was made with the permission of the police officer. However, there was no record of this within the body of the transcript.
43. According to the transcript, the claimant had not asked the police officer about times. The police officer - on the claimant's case - was looking at records during their conversation and did not have any personal involvement in the incident. The tribunal found that the officer sounded unsure and uncertain during this conversation. The officer said that the family was told that the resident was missing and so they called the police. There was also a reference to the bus driver calling the police.
44. The claimant and his union representative relied on this recording to allege that the resident's family had taken the resident out of the home surreptitiously and had left him outside. Before the tribunal, although not during the disciplinary procedure, the claimant said that the family might have waited in a nearby café during this.
45. The claimant and his union representative contended that there was no coach driver involved and they described the reference to him as a lie. This was not supported by the transcript of the police recording which expressly mentioned a bus or coach driver. The claimant told the tribunal that the transcript of the recording was wrong. However, the transcript of the recording had previously been agreed before the tribunal and there was no suggestion in any witness statement or in the appeal meeting, or any other document, that the transcript of the recording was incorrect. The tribunal accordingly found that the transcript accurately reflected the recording played in the disciplinary hearing which included the police officer referring to a coach driver.
46. The claimant told the disciplinary hearing that he was suspicious of the resident's daughter, in effect, because she did not appear to be surprised when he told her that the resident was missing.
47. According to the minutes, the claimant told the disciplinary hearing that he was in the staff room from 11.45am-12.00pm. He told the Tribunal that in fact he had not said this. The tribunal found it was more likely than not that the minutes were correct in this respect because whilst the claimant challenged parts of the minutes, he did not challenge this.
48. The claimant's representative and the claimant did not deny, including at the tribunal hearing, that the claimant completed his incident report assuming that H's fifteen-minute observations were accurate. This was said twice in the meeting. The claimant repeated his charge that H was unreliable because she could not understand English.
49. After the disciplinary hearing Ms Burgess, on the 19 August 2019, spoke to the resident's daughter but there were no records of this.
50. Ms Burgess summarily dismissed the claimant by way of a letter on 20 August 2019 at page 107. She found against the claimant on three charges – he

was unaware that the resident had left the building till contacted by the police, falsifying the records to mislead and instructing H to falsify records. The claimant, it was said, admitted the first charge and was unable to provide a reasonable explanation for the second and third charges.

51. H was given a final written warning.
52. The claimant appealed on 24 August 2019 on the grounds that the reason he was dismissed was not as stated by the respondent, but because Ms Burgess had incorrectly assumed that he had recorded the police officer without permission. He said that he was dismissed because of the recording rather than the allegations.
53. The appeal was heard by Ms Craig on 13 September 2019. At the appeal meeting the claimant and his representative repeated the allegation that the family had, in effect, surreptitiously absconded with the resident. There was an allegation that the dismissal was a “set-up” by Mr Catterwell.
54. Ms Craig refused the appeal, save that the process was unfair because there was insufficient detail in the dismissal letter. She ordered Ms Burgess to produce a new letter. The dismissal letter was re-issued on 26 September 2019. In it, Ms Burgess clarified that she had found the claimant falsified the record, based on Ms Condie’s report and her conversation with the resident’s daughter.
55. Ms Craig also found against the claimant’s suggestion that the dismissal was a set-up because he had seen his job advertised on the website prior to dismissal. She said that she had found that there was a permanent advert for a nurse on the respondent’s website for the home.

The Law

56. The law is found at Section 98 of the Employment Rights Act as follows:

98General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(b) relates to the conduct of the employee,

...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

Submissions

57. Both parties made oral submissions.

Applying the law to the facts.

58. In respect of evidence, the tribunal was presented with what used to be an unusual situation, albeit somewhat less so in times of Covid. The tribunal did not hear evidence from the decision maker. It heard from Ms Jacks of HR who, on her case, had been involved in giving some support to the decision maker at the material time.
59. Ms Burgess was not before the tribunal. Accordingly, the tribunal had no choice but to place in general more reliance on the contemporaneous documents than on the respondent's witnesses.
60. The first issue for the tribunal was the reason for the dismissal. Was it misconduct? The tribunal applied the definition found in *Abernethy v Mott, Hay & Anderson CA 1974*, 'A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. According to the Court of Appeal in *Gilham v Kent County Council CA 1985*, if on the face of it the reason given by the employer could justify dismissal, then it passes as a substantial reason and the enquiry moves on to reasonableness. In effect, the burden on the employer at this stage is not a heavy one.
61. The tribunal applied this to the facts. The incident started with the intervention of a third-party; it was not disputed that the police had contacted the home to say that one of the residents was outside, confused and vulnerable.
62. Further, the home's records - the 15 minute observation reports and the incident form - did not match the police account. There was no challenge to the police becoming aware of the resident being outside by 11.54am. Accordingly, it was not physically possible that the resident left the home at 12.15pm as stated on the incident form completed by the claimant.
63. Further, H made a serious allegation against the claimant. In the view of the tribunal, the contemporary documentary evidence showed that there was a case for the claimant to answer. It was entirely plausible that the respondent in these circumstances would want to investigate the claimant.
64. The tribunal considered the alternative explanation put forth by the claimant. The claimant frankly said that he was unsure exactly what was in the respondent's mind when he was dismissed. However, at the appeal, he had said that, in terms, it was a "set-up", that is, the decision to dismiss was predetermined. The tribunal understood his case to be that, in effect, the respondent wanted to dismiss him and took advantage of the missing resident as a pretext.
65. There was some suggestion by one claimant witness that the area director was part of this "set-up" because he was at the home of the day of the incident. However, this was not relied on by the claimant and the tribunal did not take account of this suggestion.

66. The tribunal took into account the fact that Ms Burgess was not before it to give evidence. However, Mr Catterwell, who on the claimant's case was behind what he described as a set-up, was. The tribunal had the opportunity to hear his evidence and hear him cross-examined. He denied in terms that he had orchestrated any set-up. He said that staff were difficult to get. In the view of the tribunal, this was corroborated by the respondent's unchallenged evidence that there was a permanent advert for an extra nurse to work at the home.
67. The tribunal accepted that the claimant made complaints about staffing matters at the home to the area director on the day of the incident. The tribunal was not in a position to know whether or not these were justified. However, it was not denied that other staff raised the same complaints, for instance, Ms Anthony, and no action was taken against her.
68. Accordingly, on the balance of probabilities, the tribunal found that the respondent discharged the burden upon it of showing that misconduct was the reason for the dismissal. As this was a potentially fair reason under Section 98, the tribunal went on to consider reasonableness.
69. As both parties agreed, the tribunal applied the test set out in *British Home Stores Ltd v Burchell [1978] IRLR 379*. In order to dismiss fairly, an employer must have a reasonable and genuine belief in the culpability of the employee based on reasonable grounds, with the caveat that the burden of proof is now neutral.
70. In respect of the Burchell test, a tribunal may not substitute its view of what constitutes a reasonable belief or a reasonable investigation for that of the employer. The tribunal must ask itself, did the belief come within a range of reasonable beliefs available to the employer in the circumstances and did the investigation come within a range of investigations available to a reasonable employer in the circumstances?
71. The tribunal found that, on circumstances of the case, more would be required of the Respondent's investigation and process when applying the band of reasonable responses test. This was because there were unusually significant consequences of the dismissal (see *ILEA v Gravett [1988] IRLR 497 EAT*, *A v B [2003] IRLR 405 EAT* and *Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721 CA*). The claimant was a professional person facing an allegation of falsifying records.
72. The employer's belief was, according to the dismissal letter, that the resident exited the building, and the claimant was unaware until he was called by the police, that the claimant falsified the incident report with an intention to mislead, and instructed one of his reports to falsify records, also to mislead.
73. Again, the tribunal was faced with the difficulty of not hearing from Ms Burgess. The outcome letter did not set out her thinking to any material extent. The later outcome letter was a little more detailed. However, as it was written somewhat after the events and as a result of the appeal, the tribunal treated this second letter with caution.

74. The tribunal had the benefit of Ms Jacks's account of her conversations with Ms Burgess, some of which were contemporary. However, her statement was signed over a year and a half after the material events. The tribunal concluded that it would be challenging for Ms Jacks to distinguish precisely between conversations she had at the time and what she now thought, both in her statement and in her evidence before the tribunal. Nevertheless, she was certain that she remembered the claimant's allegation - that the resident's daughter had deliberately taken the resident from the home and taken him to the bus station - had a significant effect on Ms Burgess because this was so striking and unusual. In the view of the tribunal this was highly plausible.
75. The question was, what was in Ms Burgess's mind when she dismissed? The tribunal took care not to confuse its view of what happened with what Ms Burgess' had decided had happened. The tribunal used the contemporaneous documentary evidence and statements to determine, on the balance of probabilities, whether Ms Burgess had a reasonable belief based on reasonable grounds and whether the respondent had discharged the burden of showing that there was a genuine belief.
76. Accordingly, the tribunal considered the documents before Ms Burgess. The documents showed that the police stated that they were informed that the resident was outside the home at 11.54am. Accordingly, the resident must have left the home some time before then. There was discussion in the documents as to how long it might have taken the resident to get to the bus station and five minutes seemed the very shortest period of time. Accordingly, the resident could have left the home no later than 11.49am. (If H was telling the truth when she said that she saw him at 11.30am, he probably left between 11.30am and 11.49am. If she was not telling the truth, then he may have left earlier.) That much was clear on the documents. The incident report completed by the claimant stated in terms that the resident left at 12.15pm. The incident report could not be reconciled with the facts.
77. One worker, H, blamed the claimant and essentially said that he advised or instructed her to make a false report. Put simply, from Ms Burgess's point of view, either the claimant or H could not have been telling the truth.
78. The claimant sought to explain H's allegation by stating that she misunderstood. There was little evidence of issues with H's command of English on the face of the documents available to Ms Burgess. H's observation reports were written in adequate and comprehensible English.
79. Another difficulty for the tribunal was that Ms Burgess said relatively little in the dismissal meeting. The claimant and the union representative did most of the talking.
80. There was some evidence before Ms Burgess that the claimant knew the resident was missing by 12.00pm. The tribunal was careful to be cautious about Ms Jack's recollection. Ms Jacks's evidence was that she remembered that Ms Burgess, when they discussed it, could not understand - if the claimant could not find the resident from 11.45am, as he said - why it took so long to take action. This, in the view of the tribunal, was the logical question

to ask on the claimant's account and the tribunal accepted that Ms Burgess was indeed influenced by this point.

81. The tribunal came to the view that that the dismissing officer made a choice between the claimant's and H's credibility, and she chose to believe H.
82. The tribunal considered the effect on Ms Burgess of the claimant's allegation made during the investigation and disciplinary process against the resident's family, who were accused of lying. The claimant had alleged that the family took the resident out of the home without telling anyone and deliberately left him at a bus station. The claimant said this twice to the investigating officer (at page 98). There was no suggestion before Ms Burgess that the resident's family had behaved in such an extraordinary way before, only that there was some unhappiness about the situation in the home. The tribunal accepted Ms Jacks's evidence that this point struck Ms Burgess because the tribunal found it plausible that such an unusual allegation would be memorable.
83. Accordingly, on the balance of probabilities, it was more likely than not that this allegation disadvantaged the claimant from coming across as a credible witness before Ms Burgess. The tribunal was not making a finding that the family did or did not act in the way alleged, only the likely effect of this allegation on Ms Burgess.
84. The tribunal also considered Ms Burgess' attitude to the recording of the police officer. The claimant in his appeal stated that she came to the conclusion that he had surreptitiously recorded the officer. Whilst the tribunal did not accept the claimant's contention that this recording was the reason for his dismissal, it did agree that Ms Burgess had come to this conclusion. There was sufficient evidence to support this conclusion from what the police officer had said and from the claimant not telling the police why he wanted information and misrepresenting that he was speaking on behalf of the home, as opposed to being under investigation by them. On the balance of probabilities, the tribunal found that Ms Burgess had concluded that the claimant had surreptitiously recorded the police officer. This was more likely than not to have adversely affected her view of his credibility.
85. The tribunal considered the claimant's contention that his dismissal was pre-determined. The tribunal took into account the suspension letter being pre-printed. This was, in the tribunal's experience, common practice. Whilst the tribunal understood the needs of the employer to get such procedural matters correct, the practice could give the impression that the decision was pre-determined. This was what appeared to have happened here.
86. The tribunal also considered the claimant's suggestion, if it can be put as high as that, that the dismissal was pre-determined, and the area director and Ms Burgess were working together. The claimant's case on this point was far from clear. However, the tribunal understood him to say that even if there was not a plot resulting in Mr Catterwell being in the home on the day, he sought to take advantage of the resident going missing. The claimant said that the area director was so angry that he shouted. The claimant's witnesses' evidence was vague on this point. The two respondent witnesses denied that this was Mr Catterwell's way of behaving and Mr Catterwell was far from

presenting to the tribunal as someone who shouted at work. On the balance of probabilities, the tribunal therefore found that this did not happen.

87. In any event, events were unfolding by the time the claimant spoke to the area director. The resident had gone missing, and the incident report was either completed or about to be completed.
88. In respect of the advert for a nurse at the home, the tribunal accepted the unchallenged evidence that there was a permanent advert for a nurse at the home. This did not indicate that the respondent, in effect, wanted to get rid of the claimant. The respondent did not challenge that the claimant had an unblemished record at the time of the incident.
89. Further, the claimant said to the tribunal that he had not engaged as much as he might have done at the dismissal meeting because he thought that it was, in effect, a waste of time because the decision was pre-determined. This was unlikely to strengthen his case before Ms Burgess.
90. The tribunal, to some extent, accepted the claimant's case on the paucity of the respondent's reasoning for the dismissal. However, on the balance of probabilities, the tribunal found it more likely that Ms Burgess was convinced by the evidence against the claimant, than that there was pre-determined decision to dismiss a long-standing qualified employee with an unblemished record.
91. Accordingly, based on the investigation, the tribunal found that Ms Burgess genuinely believed in the claimant's culpability. Further, her belief came within a range of beliefs available to a reasonable employer in the circumstances, for the reasons the tribunal has set out.
92. The tribunal went on to consider if this belief was based on a reasonable investigation. Ms Condie investigated the factual evidence. She obtained the contemporary documents, she tried to find the times of the police calls and spoke to all witnesses. The claimant knew the charges against him. In the view of the tribunal, the procedural letters were unremarkable and there was no challenge to their general format.
93. It was not the claimant's case that the investigation was unfair because Ms Condie did not tell the truth when she said the police told her that they became aware of the resident at 11.54am. This meant that the resident must have been missing no later than 11.54am.
94. The fact that H and the other witnesses were not invited to the dismissal hearing did not, in the view of the tribunal, take the investigation out of the reasonable range. There were reasons not to, in effect, set up witnesses against each other in a hearing. Although the claimant did not have the chance to question the witnesses, he had sight of their statements and the transcripts of their interviews.
95. The respondent investigated the claimant's allegation that the family had surreptitiously abducted the resident. The respondent contacted the family in this regard. The respondent's failure to put the results of this conversation

with the family to the claimant before making the decision was not best practice. In the view of the tribunal, it would have been advisable to have done this. However, this was not enough to take the investigation outside of the range, even taking the higher *Roldan* expectations into account. The family said exactly what they might be expected to say – they denied it. It was hard to see how relaying this to the claimant might have taken the investigation any further.

96. Accordingly, the tribunal found that there was a reasonable and genuine belief in the claimant's culpability based on a reasonable investigation, taking into account the range of reasonable responses test as amended by the *Roldan* line of cases.
97. Accordingly, there was no need to consider a *Polkey* deduction.
98. The tribunal went on to consider sanction. Again, the range of reasonable responses test applies. A tribunal may not substitute its view of what constitutes a fair sanction for that of the employer. The fact that the tribunal might have acted differently – giving a warning for instance - is irrelevant. The question is, did the sanction of dismissal fall within a range of sanctions available to a reasonable employer in the circumstances?
99. Although the claimant's case did not appear to be put on this basis, the tribunal did consider if there was evidence that the respondent unjustly blamed the claimant for a material failing - a resident going missing, being found by the police, and the family finding out. At best this might be embarrassing for the respondent, there might be reputational damage and regulatory consequences.
100. However, the claimant did not put this case. The claimant was the person in charge as defined in the respondent's policy and his account, both in the incident report and during the investigation, did not fit with the facts. The tribunal could see no evidence that he was in effect scapegoated.
101. In the view of the tribunal, there was an argument that the first charge - that the claimant was unaware that the resident was missing before the police called - on its own might not be enough to bring dismissal within the reasonable range.
102. However, the second and third charges could not but fall within the reasonable range. The claimant was a qualified nurse. He had responsibility for caring for extremely vulnerable elderly people. The respondent had found, consistent with the Burchell test and coming within the reasonable range, that the claimant misleadingly falsified an incident report and instructed his report to falsify records. It was not disputed that care home records are of great importance, and it is crucial that they are accurate. The claimant was the person in charge on the day in question. Dismissal on the second or third charges, in the view of the tribunal, came well within the range of reasonable responses.

103. Finally, and for the avoidance of doubt, as the tribunal found that the dismissal was fair, there was no need to consider contribution or the ACAS code.

104. Accordingly, the tribunal dismissed the claim.

Employment Judge Nash

Date : 23 June 2021

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