EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107038/2019 (V)

Held on 24, 25 and 26 January 2022 (By CVP)

Employment Judge: B Campbell

Ms J Milne	**Claimant** **In Person**
Glasgow City Council	**Respondent** **Represented by:** **Ms G O'Neil –** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

1. the claimant was fairly dismissed from her employment with the respondent by reason of her conduct; and

2. her claim is therefore dismissed.

INTRODUCTION

1. This claim arose out of the claimant's employment with the respondent. The claimant worked as a Home Care Assistant for the respondent. Her continuous service began on 24 November 2003 and ended on 23 November 2018 with her dismissal.

2. The respondent argues that it fairly dismissed the claimant on grounds of her conduct and using reasonable and adequate procedures to do so. The claimant maintains that there were inadequate grounds for a finding of misconduct, that the sanction was in any event too harsh and that aspects of the process followed were inadequate.

3. The Tribunal heard evidence on the respondent's behalf from Ms Carol Quigley, Area Operations Manager, Mr Gordon Bryan, Operations Manager and Ms Liz Hamilton, HR Advisor to the appeal committee. The claimant gave evidence on her own behalf. She had earlier indicated that she may wish to lead evidence from her daughter in law, who previously worked for the respondent and/or its predecessor in a similar role to the claimant, but decided it was not necessary to do so.

4. Mindful that the claimant was representing herself, time was taken to explain the various procedures, conventions and rules which apply to the pursuit of employment claims before an employment Tribunal.

5. A joint bundle of the relevant documents was helpfully prepared and where relevant page numbers in square brackets below correspond to those pages in the bundle. The claimant provided a schedule of the losses she was claiming and the respondent provided a counter-schedule.

LEGAL ISSUES

The following legal issues had to be decided:

6. Was the claimant dismissed for a potentially fair reason under section 98(1) and (2) ERA (conduct being one of those reasons);

7. If so, did the respondent follow a reasonable procedure and was its decision to dismiss reasonable in terms of s98(4) ERA, bearing in mind the respondent's size and admin resources, and equity and the substantial merits of the case; and

8. If not, and therefore the claimant was unfairly dismissed, what remedy if any is appropriate?

9. Should any compensation awarded be reduced to reflect the claimant's contributory conduct?

10. If the dismissal is found to be procedurally unfair, should any compensation be subject to a reduction on the basis that such flaw made no difference to the ultimate outcome?

APPLICABLE LAW

11. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a Tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that exercise.

12. Where the reason for dismissal is the employee's conduct, principles established by case law have a bearing on how an employment Tribunal should assess the employer's approach. Relevant authorities are considered below under the heading 'Discussion and Conclusions'.

FINDINGS IN FACT

13. The following findings are made as they are relevant to the issues in the claim.

Background

14. The claimant was employed as a Home Care Assistant or Home Carer by the respondent. Her duties, as the title suggests, involved providing social care services to a number of individuals with various needs within the respondent's local government area. The care she provided was in the service users' homes.

15. Service users were frequently vulnerable individuals with individual care plans in place. It was often important as part of a service user's care plan that the necessary support provided by a Home Carer was provided in a stable and consistent way, and at set times. Typically that care was being provided to complement other support the individual was receiving.

16. The claimant was initially employed in her role by an organisation named Cordia. She started working for Cordia on 24 November 2003. The service transferred to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006. The date of the transfer was 30 September 2018 [53]. The claimant's own contract of employment transferred to the respondent on that date and her job did not substantially change. The respondent recognised her continuity of service with Cordia.

Events of 12 July 2018

17. The claim centres around events on 12 July 2018. The claimant was therefore an employee of Cordia at the time, although the majority of the procedures which followed were conducted by the respondent after the transfer date. Around 9.45 in the morning of that day the claimant was witnessed by a colleague named Helen Andrews to be in her car along with her work partner, also a Home Carer outside a row of shops at a location in Glasgow. Ms Andrews wanted to see if the claimant could help her with her own rounds and telephoned a colleague, Mary Brower who is a Home Care Co-ordinator. She checked the respondent's 'Caresafe' electronic diary system, which showed that the claimant and her colleague had checked in at a service user's home nearby at 9.48am – i.e. around the same time as they had been seen by Ms Andrews.

18. The checking in and out process is followed by a carer scanning either a QR code or barcode at the service user's home. The code is part of a physical diary where notes are made by carers. They scan the code on arrival, and again on leaving and the information is relayed back to the respondent's central system.

19. On 13 October 2017 the claimant had received a letter from her then Business Development Manager [65] which stated:

> ***'use of iPhones** – I am aware of the potential to misuse the iphones and the QR codes to fraudulently record the timing and duration of a home visits. Therefore it is important that I make you aware that such actions are unacceptable and considered to be gross misconduct which could lead to disciplinary action and possible termination of employment. It also places our vulnerable service users at risk and brings Cordia into disrepute.'*

This was not a direct warning to the claimant in response to anything she had done. The letter was sent to a number of care workers. However it served as a warning in a more general sense in that it made clear how seriously her employer would treat this form of abuse of the system.

20. Ms Brower telephoned the service user's home and was told by a relative of the service user that the claimant and Ms Barrie had left some 20 or 25 minutes before.

21. Ms Brower next tried telephoning the claimant. In response to the call the claimant told Ms Brower that she had checked in at the service user's home, but then was feeling unwell and decided to make a trip to a chemist to pick up some prescription medication. She said she had left her partner at the service user's home. This was not correct, as that individual had travelled with the claimant in her vehicle and was witnessed by Ms Andrews.

22. Ms Brower considered this unusual and telephoned Ms Andrews, who in turn called Ms Caroline Quigley, an Area Operations Manager and as such a line

manager of the claimant. She sought advice from a colleague in Human Resources and was advised to begin a disciplinary investigation.

23. Later that day Ms Quigley spoke to the claimant and her partner, and asked them to come in to see her. She also had a conversation with Ms Andrews. The claimant came into the office and had a discussion with Ms Quigley at the end of that working day. Ms Quigley did not intend those to be formal investigation meetings, which might happen later. She wanted to tell the claimant and her partner that she was going to undertake a formal investigation and that they would have the chance to respond if any disciplinary case was established.

24. Neither the claimant nor her partner was suspended. Ms Quigley did not consider there was sufficient risk to require that step. Each went back to their duties from the following day.

Investigation

25. Ms Quigley conducted her investigation along with another Area Operations Manager named Louise Whitham. They interviewed the claimant, her partner, Ms Andrews and Ms Brower.

26. The claimant attended a disciplinary investigation interview on 9 September 2018. She signed a copy of the note taken of the conversation and is taken to have accepted it as true and accurate [37-39]. She initially said she had arrived at the service user's home at 9.40am on the day in question, but after further discussion said she had arrived at around 9.20am. She said she decided to go to a chemist to pick up some medication as she was feeling unwell, that she had forgotten to scan in on arrival at the service user's home and therefore took the code with her.

27. It was put to the claimant that the Caresafe system showed that she had checked in with her next service user on her list at 9.30am. She replied to say that this record must be correct and therefore she was mixed up about her timings. When asked if she falsified that record she replied that *'It was only in Mrs [first service user]'*.

28. The claimant was then asked whether she had copied the QR code onto her phones so she could record she was at the service user's home when she was not in attendance. She confirmed she had, but it was the first time she'd done it and she felt very ill and was not thinking straight. She did not call her co-ordinator to report feeling ill.

29. Ms Quigley and Ms Whitham believed there was enough of a case for the claimant to answer to warrant a disciplinary hearing being arranged. Their main concerns were that records appeared to have been falsified and that there may have been a risk or a negative effect in relation to the care provided to the service user, who required to take medication and relied on the visits being at their scheduled time. The claimant's input was part of a wider support plan for the individual. They prepared a report to record their investigation [41-42].

Disciplinary hearing

30. At this point in the process matters were passed over to Mr Gordon Bryan, an Operations Manager with the respondent. He was provided with copies of the documents to date which he read. He arranged to chair a disciplinary hearing on 23 November 2018 and the claimant was sent an invitation letter.

31. The invitation letter said the purpose of the hearing was *'to discuss the allegation that you failed to follow the correct procedures when utilising the care safe system within service users' homes.'*

32. The letter went on to warn the claimant that owing to the seriousness of the allegation, a possible outcome was summary dismissal. Similarly, there could be referrals to Disclosure Scotland under the Protecting Vulnerable Groups (PVG) scheme and to the Scottish Social Services Council.

33. The claimant attended the disciplinary hearing as scheduled. The hearing note produced was not challenged and is accepted to be a sufficiently accurate account of the discussion [45-49].

34. Present at the hearing were the claimant, Mr Bryan, Ms Julie Ralph of UNISON to accompany the claimant, Ms Quigley, and Mr John Leese who was an HR Business Partner.

35. Ms Quigley's attendance was so that she could read out her investigation report and answer any questions in relation to the investigation process.

36. The claimant's position in response to the allegation was that:

    a. She began to feel unwell and had to fetch some medication. She had forgotten to pick it up in the days before and had not taken it for a few days;

    b. She thought she could finish up early with the service user and collect the medication. Her partner agreed with that;

    c. At the point she was viewed in her car she had just picked up her medication and taken some. Around that time she scanned the service user's code using a photograph her partner had taken of it. She didn't physically remove anything from the service user's home;

    d. This was the first time she had done so. She was 'stressed out' and her behaviour was out of character.

37. Mr Bryan adjourned the meeting to consider whether he could reach a decision on the outcome. He considered the claimant had committed an act of gross misconduct. He believed she had breached the trust put in her by her employer, and she had falsified work related records. He considered her mitigatory statements, her clean disciplinary record and her length of service. He concluded that they did not deflect from the seriousness of her conduct. He considered that if she needed to pick up prescription medication she could have done so during a break later that morning, or taken time off under the sickness absence procedure if the matter was particularly urgent or serious. He believed she had broken the trust placed in her as an employee.

38. Mr Bryan reconvened the hearing and confirmed his decision to the claimant. He said that he believed he had no other option but to dismiss her with

immediate effect. The claimant was informed that she had a right to appeal the decision and that the decision would be confirmed to her in writing.

39. The claimant received Mr Bryan's outcome letter dated 3 December 2018. It confirmed that:

    a. By her own admission she misused the QR system to suggest she had scanned in and out of a service user's home at times different from those which applied;

    b. Her mitigating circumstances were not sufficient, particularly as she could have waited until a scheduled break later in the morning to pick up her medication;

    c. That she had neglected her duties as a Home Carer which placed a vulnerable service user at risk; and

    d. That her actions fell short of the standards required of a Home Carer and were in breach of the respondent's own code of conduct and the SSSC code of practice, as well as amounting to gross misconduct.

40. Mr Bryan also held a disciplinary hearing with the Home Carer who had been with the claimant on the morning of 12 July 2018. He took the decision to dismiss her also for her part in those events.

Appeal

41. The claimant appealed against her dismissal by a letter dated 7 December 2018 [58]. Her grounds were that:

    a. The decision was overly punitive given her good work and attendance record, and unblemished disciplinary record before the event in question; and

    b. Insufficient consideration was given to mitigating factors that contributed to the incident.

42. Her appeal was heard by a committee made up of three of the respondent's councillors as is the respondent's procedure. An appeal pack was put together containing the relevant documents.

43. An appeal hearing was scheduled for a date in March 2019, but it was discovered that one of the committee members had a conflict of interest in relation to the claimant and had to step down. A replacement was found but this required the hearing date to be put back. The respondent is normally able to hold an appeal hearing within two months of an appeal being intimated. Around this time a number of other appeals were going on and it was more challenging that normal to secure three councillors to make up a panel.

44. The hearing took place on 30 April 2019. The claimant attended along with Mr Ralph. Mt Bryan, Ms Quigley and Mr Leese were also present.

45. Although none of the committee members gave evidence to the Tribunal, the minute of the appeal hearing was not challenged, and is accepted as a suitably reliable record of what was said [71-82]. Its accuracy was also confirmed by Ms Hamilton, an HR officer who was at the meeting.

46. The committee called Ms Quigley and Mr Bryan in turn to answer questions. The claimant was given the opportunity to question them also. She was then allowed to put forward her own case. Both sides – management and the claimant - then summed up their positions.

47. The committee adjourned before returning to deliver their decision. They had unanimously decided to uphold the decision of Mr Bryan to dismiss the claimant. They accepted the claimant's submissions in mitigation for her actions but considered that Mr Bryan was entitled to decide that was not enough to outweigh the seriousness of her breach of standards and procedures. They considered reinstating the claimant with a warning in place but ultimately concluded that was an inadequate response to her misconduct.

48. The committee's decision was confirmed in a letter dated the same day of the meeting itself [83]. This concluded the process available to the claimant.

DISCUSSION AND CONCLUSIONS

Was the claimant's dismissal for a potentially fair reason?

49. The first question to decide is what was the reason for the claimant's dismissal, and is that a permitted reason under section 98(1) and (2) of ERA? One such reason is conduct – section 98(2)(b).

50. It is found that the respondent has proven on the evidence provided that the claimant was dismissed because of her conduct. All of the relevant documents provided and spoken to suggested this. A disciplinary process was followed, involving the usual steps of investigation, hearing and appeal. The disciplinary outcome letter in particular makes clear that the reason for her dismissal was gross misconduct, for which dismissal was thought to be an appropriate and proportionate response.

51. There was no material evidence to the contrary and the claimant herself did not argue that this process was a shield for a different reason which the respondent used to dismiss her. For example, her appeal grounds were that the sanction was too harsh and relevant mitigatory factors had not been given adequate consideration.

Was the dismissal reasonable in all of the circumstances?

52. The next issue therefore to decide is whether the respondent acted reasonably in implementing dismissal for the above reason. Section 98(4) ERA requires that fairness of a dismissal:

    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.'*

53. This provision requires a Tribunal too look at the wider situation, including factors such as whether a fair process was carried out, whether dismissal was a proportionate response and whether the employer has acted consistently with any other similar cases.

The 3-part *Burchell* test

54. In assessing the overall reasonableness of an employer's actions in such cases ***British Home Stores Ltd v Burchell [1978] IRLR 379*** will apply. This is a longstanding authority, regularly applied to misconduct dismissal cases.

55. ***Burchell*** requires three things to be established before a conduct-related dismissal can be fair. First, the employer must genuinely believe the employee is guilty of misconduct. Secondly, there must be reasonable grounds for holding that belief. Third, the employer must have carried out as much investigation as was reasonable in the circumstances before reaching that belief.

56. In relation to the first part of the ***Burchell*** test, it is accepted that there was a genuinely held belief in the claimant's misconduct. This was held by Mr Bryant. His belief was not challenged in any recognisable way and in any event his evidence is accepted on this point. That evidence was as given under oath to the Tribunal and by way of the documents which were created in the course of the disciplinary processes, including his outcome letter.

57. According to ***Burchell*** it is next necessary to consider whether the respondent had reasonable grounds for holding the belief that the claimant was guilty of misconduct.

58. There was sufficient justification for Mr Bryant to consider the claimant's actions to be a serious matter. Although no harm was evidently done on that occasion, there were valid reasons why Home Carers should follow the schedule of their daily appointments and spend the allocated amount of time with each service user.

59. The evidence itself was clear and uncontested. The claimant had created a false record of when she had arrived at and left a service user's home, using a practice which the respondent had flagged up as forbidden. She and her colleagues had been put on notice by the letter of 17 October 2017 that abuse of the code reading process would be viewed as gross misconduct and potentially lead to termination of employment.

60. Also relevant was the extent to which the claimant made concessions during the disciplinary process. She admitted to breaking the rules and knowing that she had.

61. It is therefore found that the respondent's belief in the claimant having committed an act of misconduct was genuine.

62. The third limb of ***Burchell*** requires consideration of whether the employer carried out as much investigation as was reasonable in the circumstances in order to reach its genuine belief in the employee's misconduct. That does not require an employer to pursue every avenue irrespective of time, cost and prospects, but no obviously relevant line of enquiry should be omitted.

63. The legal test, as emphasised in ***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*** is whether the investigation fell within a band of reasonable approaches, regardless of whether or not the Tribunal might have approached any particular aspect differently.

64. The respondent's investigation was sufficiently thorough in this context. No obvious line of enquiry was omitted. The key evidence was gathered promptly and reliably. The picture of what had happened was clear, in large part because the claimant (to her credit) was open about what she had done.

The band of reasonable responses

65. In addition to the ***Burchell*** test, a Tribunal must be satisfied that dismissal fell within the band of reasonable responses to the conduct in question which is open to an employer in that situation. The concept has been developed

through a line of authorities including ***British Leyland UK Ltd v Swift [1981] IRLR 91*** and ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439***.

66. The principle recognises that in a given disciplinary scenario there may not be a single fair approach, and that provided the employer chooses one of a potentially larger number of fair outcomes that will be lawful even if another employer in similar circumstances would have chosen another fair option which may have had different consequences for the employee. In some cases, a reasonable employer could decide to dismiss while another equally reasonably employer would only issue a final warning, or vice versa.

67. It is also important that it is the assessment of the employer which must be evaluated. Whether an employment Tribunal would have decided on a different outcome is irrelevant to the question of fairness if the employer's own decision falls within the reasonableness range and the requirements of section 98(4) ERA generally. A Tribunal must not substitute its own view for the employer's, but rather judge the employer against the above standard. How the employee faced with disciplinary allegations responds to them may also be relevant.

68. Taking into account all aspects of the above approach, it is found that dismissal of the claimant was within the band of reasonable responses open to the respondent in these circumstances.

69. The decision which Mr Bryan ended up being faced with was whether the claimant's admitted misconduct should be mitigated by factors such as her long service, clean disciplinary record and history of being a good worker. He decided that was not enough and he was entitled to do so, even if he might equally fairly have decided to give the claimant a last chance by way of a final warning. The same applies to the decision the appeal committee had to make.

70. Mr Bryan also chaired a disciplinary hearing involving the claimant's work partner, and decided to dismiss her for gross misconduct also. There was no suggestion of inconsistency in treatment.

71. Although the appeal hearing had initially been scheduled for March 2019, that was still more of a delay than would have been ideal. However, the delay in itself is not enough to render the whole process unfair. There was no evidence of the delay hampering the fairness of the hearing when it did take place. Therefore the delay did not take the process, or the decision to dismiss itself, outside of the band of reasonable responses.

CONCLUSION

72. As a result of the above findings it is not necessary to address further matters such as contributory conduct, *Polkey*, mitigation or other aspects or remedy.

73. The claimants was fairly dismissed by reason of her conduct after a reasonable process. Her claim must therefore be dismissed.

Employment Judge: Brian Campbell
Date of Judgment: 10 March 2022
Entered in register: 11 March 2022
and copied to parties