



EMPLOYMENT TRIBUNALS

Claimant: Ms J Kantova

Respondent: Tree Vale Limited

Heard at: Liverpool

On: 8 February 2022
14 March 2022

Before: Employment Judge Ganner (sitting alone)

REPRESENTATION:

Claimant: Mr D Hayes, Representative

Respondent: Mr S Kirkby, Company Director

JUDGMENT

The judgment of the Tribunal is that the claim for unfair dismissal fails and is dismissed.

REASONS

Introduction

1. By a claim form presented on 15.7.2021 Ms J Kantova, the claimant, complained of unfair dismissal from Tree Vale Limited, the respondent.
2. By its response form the respondent resisted the complaint. Their position was the claimant had been fairly dismissed for gross misconduct
3. The reason for the dismissal was not in dispute. On that basis the issues to be determined by the Tribunal were agreed at the outset of the hearing as follows:
 - (1) Did the respondent genuinely believe the claimant was guilty of misconduct?
 - (2) Did the respondent have reasonable grounds for that belief?
 - (3) Was that belief formed following a reasonable investigation?

- (4) Did the respondent follow a reasonably fair procedure?
- (5) Was dismissal rather than some lesser disciplinary penalty within the band of reasonable responses to dismiss the claimant rather than impose a lesser penalty such as a warning?

Evidence

4. I heard evidence from the claimant in person and from the following witnesses called by the respondent:

- Ms L Kirkby, Company Director
- Mr J Kirkby, Company Director
- Ms C Riley, Care Worker
- Ms J Halewood, Care Worker
- Ms B Davies, Administration Worker

Bundle

5. An agreed bundle of documents was provided.

Relevant Factual Findings

6. I set out my factual findings below resolving disputed matters at the end of this section.

7. The claimant was employed as a Senior/Night Care Supervisor at Tree Vale, Acorn House, a residential Care Home owned and run by the respondent. The claimant commenced her employment on 24 August 2017 and signed a contract of employment on that date.

8. The contract incorporated the disciplinary rules. Rule 1.4 defined gross misconduct as “behaviour of such a nature that the company is justified in no longer tolerating the continued employment of the employee who commits such an offence” and set out examples of offences which might be regarded by the company in the light of the circumstances and nature of each particular case as gross misconduct thus warranting dismissal without previous warning:

1.4(a) Ill treatment or wilful neglect of residents;

1.4(f) Violence or other exceptionally offensive behaviour.

9. On the morning of 1 March 2021, the claimant had just finished her night shift and was due to hand over to the day staff. A 74-year-old male resident with Alzheimer’s walked into the dining room wearing the claimant’s coat.

10. An incident then took place which led to the claimant’s dismissal. It is said that on seeing the resident wearing her coat she became very angry and shouted the garment was hers. She and then tried to forcibly remove it by pushing his head

forward. Colleagues intervened and retrieved it in a more sensitive and appropriate manner, and it was returned to the claimant. The claimant then realised the resident had taken some items (dog poo bags containing treats) from its pockets and whilst still angry and she attempted to/ forcibly retrieved these from his hand.

11. Andrea Healey, the deputy manager, telephoned the manager, Mandy Courtenay to report the incident. Ms Courtney instructed Ms Healey to suspend the claimant. A letter informing her of this was hand delivered that afternoon. doc1.Ms Courtney documented that the claimant had told her deputy she knew she was in the wrong and was stressed about her ill sister.

Investigation

12. Ms Courtney spoke to care team members (whom she described as very upset and shocked) and obtained witness statements from them She followed various protocols notifying the Wirral Council's safeguarding team. They advised police action, that the staff member actions were gross misconduct and dismissal should be actioned. They also advised the claimant should be placed on the SOVA list. I was told this is akin to a Disclosure and Barring referral with the possible outcome that an individual can be prohibited to work with vulnerable persons. The claimant was not, in the event, placed on that list.

13. The police recorded the matter as a crime but decided not to arrest the claimant. The Care Quality Commission were notified on 3 March 2021.

14. Having informed the homeowners of the events it was decided disciplinary action should be taken.

15. The witness statements can be summarised as follows:

- (1) Sue Morgan described how the claimant noticed the resident was wearing her coat. She shouted at him in aggressive manner to take it off. She then went towards him and pushed his head forward and started to drag the jacket off him. Louise Irvine stood up and said to the claimant to give the handover to Connie Reilly and that she would try and get the coat off him. Louise approached the resident and asked him very calmly to take the coat off as it was too small for him and offered to get him one of his own. He was co-operative then Angie Griffiths got up to help Louise to take off the jacket. As they were doing so, he removed his hand from the pocket and was holding poo bags [containing dog treats] The claimant, in a very aggressive manner, shouted they were hers and stated that they should be given back to her. As the resident had kept hold of the bags the claimant snatched them out of his hands.
- (2) Connie Reilly (who also gave like evidence to the tribunal) described the claimant shouting and pulling at the coat saying it was hers. Louise offered to help and suggested the claimant do the "handover." She described the claimant as very angry and how she started shouting and pulling at him, specifically pulling his head down to pull the coat over his head. Another staff member stood in and moved the claimant back and he gave the coat up. She described how the claimant was very

angry when noticing the resident had removed some of her things out of the pocket and started grabbing them from him still shouting. The claimant was told to calm down

- (3) Angie Griffiths, who was sitting opposite the dining room door described how on noticing the resident had the claimant's coat on, she started to shout and scream at him, saying it was her coat and to take it take it off. The claimant was red in the face and very aggressive towards the resident, trying to grab the coat off him. Then, she said Louise Irvine stood up and got between the claimant and the resident and told her to do the handover and she would try and get the coat off him. The witness went over to assist Louise and calm him down saying it wasn't his coat. Connie Reilly removed the garment and gave it back.
- (4) Jayne Heywood (who also gave like evidence to the tribunal) described how the claimant immediately approached the resident demanding he gave her the coat back and how she roughly tried to retrieve it. She said Louise quietly told the claimant to give the handover to Connie and she would retrieve the coat which she began to do. Angie got up to help and at this point the claimant "once again" approached him and put her hand round the back of her neck and pulled his head forward to retrieve it. She described looking away at this point. She stated that Angie, Sue and Louise then left the room to go to the staff room and Andrea and Kelsey came in the room at the end of the altercation. She said the resident appeared to have something in his hand and how the claimant approached him demanding her poo bags back then retrieving them from his hand, though she did not notice how. She described herself as being in shock. In evidence before the Tribunal Ms Heywood repeated that she had never really witnessed an altercation like this before and expanded on her description of how the coat was removed. She accepted the incident was entirely out of character as far as the claimant was concerned.
- (5) Louise Irvine described how, having arrived at work to start the morning shift, she went into the dining room for the handover. She was sat at a table next to the dining room door. The resident walked in wearing the claimant's coat. She went over to him very aggressively and started shouting pulling and dragging the coat off him in an aggressive manner. She jumped up from her chair put herself between the resident and the claimant and told her to stop and would the claimant just go and give handover. She said she did this diplomatically to defuse the situation and explaining to the resident that the coat was not his and was too small. She was then assisted by Angie Griffiths and described how they were calming him down and making sure he was no longer distressed. She noticed how the claimant then had her coat in her hands She recalled how the gentleman started rubbing his arms and that "they seemed a bit red. "
- (6) Andrea Healey the deputy manager, saw the latter part of the incident in which she described the claimant as attempting to remove items from the resident's pocket and hands, raising her voice, shouting at him to give the stuff whilst trying to get them out herself. She described how

he had no understanding what the claimant was asking, and how the claimant became increasingly agitated, shouting “they are mine.” She intervened and told the claimant to calm down and that it was unacceptable to talk to him in that way as he had no comprehension and did not understand. She stepped away and shouted she was “very angry.” The claimant left the building and contacted Mandy Courtenay the registered manager to inform her of what had gone on. Ms Healey later spoke to the claimant on the phone and explained her behaviour was unacceptable and could not be tolerated then suspended the claimant and told her the manager would get in touch following full investigation.

Disciplinary

16. On 4 March 2021, the claimant was sent a letter from Ms Louise Kirkby informing her that she was required to attend a disciplinary interview on 9 March 2021 to face an allegation of gross misconduct, namely violence or other exceptionally offensive behaviour towards management, other members of staff, residents or visitors. The letter indicated that disciplinary sanctions could be considered one of which might be termination of her employment. It set out that the claimant was entitled, if she wished, to be accompanied by another work colleague or representative.

17. The claimant was not invited to attend an investigatory meeting prior to the disciplinary hearing nor was she sent nor given in advance of the disciplinary hearing any copy witness statements/policy documentation.

18. The disciplinary meeting took place on 9 March 2021 and was chaired by Ms L Kirkby; the manager Ms Courtenay was also in attendance.

19. The minutes of the hearing record the claimant explaining she had been stressed as she had had a phone call from her nephew saying her sister was dying and was in a coma, and that last year she had lost her mother, father and dog and felt “what was the point- everybody was dying.” She said she knew she was “out of order.” Ms Kirkby went over the events and the claimant agreed these were factual and correct and she knew she had lost her job. When the deputy manager rang to suspend the claimant, she had been expecting to be dismissed there and then. The manager asked if she agreed that she had acted wrongly and should not have shouted or physically touch(sic) the resident? The claimant stated that whilst the event was happening, she knew it was wrong and tried to stop herself, but she was angry and carried on anyway. She said the resident was a lovely man. She apologised for all the trouble she had caused Ms Courtenay.

20. Ms Kirkby gave evidence before the tribunal and was cross examined by Mr Hayes. She agreed the witness statements had not been sent to the claimant prior to the meeting but indicated that before the hearing began, prior to entering the room the claimant apologised and said she was really sorry. During the meeting she read the statements to the claimant who admitted the misconduct. Ms Kirkby accepted there had not been a separate investigatory meeting. She said matters would have taken a different course had the claimant denied the matter but she did not do so. Ms Kirkby said how safeguarding, namely Wirral Borough Council, had advised the matter should be reported to the police, that it was gross misconduct and that

consideration of dismissal should also be actioned. Ms Kirkby said the council and the Care Quality Commission had to be told within 48 hours of the incident. She maintained dismissal was not an automatic outcome though the respondent took on board the council's views. She conceded she did not apply or consider any stress guidance policy at the disciplinary stage but that was because the misconduct was so grave as to make that option unrealistic.

21. As to the claimant's appeal rights, she stated the claimant was verbally informed of these at the meeting, although she conceded this is not reflected in the notes. She rejected Mr Hayes criticism that it was only his hand delivered letter that had prompted the respondent to send an appeal letter on 17 March, this being beyond the five-day period stipulated/recommended in the ACAS code of practice. She maintained the claimant got all material documents for the appeal including witness statements and policies sought by the claimant's representative.

22. On 17 March 2021, the claimant was sent a letter confirming the decision that was taken to immediately terminate her employment for the gross misconduct found to have taken place. The grounds were set out as per 1.4 of disciplinary policy, namely ill treatment/neglect of residents and violence. The reason for the dismissal was recorded as being that she had physically and verbally assaulted a vulnerable resident who had put her coat on. She had followed no guidelines to redirect him to return the item to her, and she had shouted at him and touched him physically in an aggressive manner to remove the coat, the same being witnessed by numerous staff who were on the shift and intervened to stop the incident. It was recorded that the claimant had taken full responsibility for her actions and admitted to Louise Kirkby and Mandy Courtenay that she had acted inappropriately and in an unacceptable way and had been expected to be dismissed on the day when suspended by the duty manager. She was given the right to appeal within seven days of the letter which enclosed statements from staff, investigation record and minutes from the disciplinary meeting.

Appeal

23. On 22 March 2021 a letter was sent by the claimant indicating/confirming her wish to appeal. She complained that she had not been provided with appropriate documentation or details prior to the disciplinary meeting. She said the respondent had failed to involve her in any investigation if one was completed at all. Further, the witness statements that had been collected were false and did not provide a true reflection of events. At no point were her circumstances considered, she had not been advised of any disciplinary process or any management process. The disciplinary meeting transcript was false and not a true reflection of the meeting, at which no-one was taking notes. The claimant asked for further documents to be provided to her and these were duly sent. The claimant acknowledged receipt by text.

24. The appeal duly took place before Mr James Kirkby, company director on 1 April 2021 with Ms Barbara Davies as notetaker, both of whom gave evidence before the tribunal.

25. The notes record the claimant stating that she did not wish to cause any trouble for herself or anybody else and that the incident was not reflective of her as a person at all. She stated how she loved her job at the home and considered the

residents to be her friends and that she had worked a lot of hours. She had confided in friends regarding her dismissal as she did not understand English law.

26. The claimant freely admitted the incident had occurred with the resident as she was due to leave work at 8.00am on 1 March 2021 and discovered he was wearing her coat. She said she just “snapped.” She said that under normal circumstances she would have laughed at the situation of a man in her size eight coat but was highly stressed at the time so reacted in a way that she had never reacted before. She said that since the onset of COVID she had lost both her parents and not been able to travel to Slovakia. She had received a call earlier that morning from a relation telling her that her sister was extremely poorly and unlikely to survive. She was extremely upset as she could not talk at the time as she was working so just wanted to get home after her shift to return the call. She said had it not been so cold she would have just left her coat but having no car she needed it. She said not only would the resident not return her coat, but he was about to eat the dog treats out of the pocket which agitated her further. Mr Kirby’s recorded response to that was that it was clear the claimant was a very good hardworking member of staff and that in any other situation they would not want to lose her as a staff member. He acknowledged that everybody has done things they immediately regret but as the assault on the resident was witnessed by numerous staff members, including two seniors, the guidelines state instant dismissal and reports to the police and CQC are mandatory.

27. The claimant responded that the resident was extremely difficult to deal with and said he had been going home for his wife to perform his personal care due to his reluctance to comply with staff. She appreciated Mr Kirkby’s understanding of her stress levels when the incident occurred and that it was a moment of loss of self-control that she very much regretted. The response from Mr Kirby was that the guidelines had to be followed and failure to do so, should another incident occur with another staff member in the future, would cause difficulties, and that all the statements corroborated that the resident was handled roughly, which was deemed to be assault. The record states that the claimant signed the handwritten copy of the minutes.

28. Ms Davies was cross examined by Mr Hayes. She indicated she had pretty much taken a verbatim note and was quite clear and specific in her recollection that the claimant said she had snapped hence the use of inverted commas in the written document. The typed document stated the claimant had signed the original handwritten version of the minutes. Ms Davies was asked for the whereabouts of these as they not been disclosed to the claimant nor evidenced to the tribunal. She stated these had been mislaid or thrown away and that her attempts to locate them had been unsuccessful.

29. On 7 April 2021, a letter was written to the claimant formally upholding the decision that was made by management and enclosing a copy of the minutes that were taken. The letter stated that despite her appeal letter she did not deny what had happened or that she had admitted to Louise Kirkby that the version of events was factual and correct. She had stated that someone she knew in HR had pushed her to write the letters and make the appeal. She had only wished to appeal about the circumstances that had made her take the actions she did, that she had been under stress due to pressure outside of the home and that on top of that she had received a phone call to say her sister had been ill. All these pressures effected (sic) her

judgment and that she deeply regretted what she did. Mr Kirkby acknowledged her good record and that she was a valued member of staff but stated that once in incident occurs like this the manager is bound to report the incident to safeguarding and the police. Since the incident was witnessed and not denied by the claimant, he had to uphold the decision made. Accepting that pressures of life outside the home led her to take the action she did, the management could not take the risk of repeat of the incident by continuing her employment.

Findings on disputed relevant facts

30. There was a conflict of evidence as to what had been said at the disciplinary and appeals hearings, respectively.

31. Ms Kantova was specific in her denial of having accepted the loss of her job prior to the first meeting nor having apologised for her behaviour during it. She said no notes were taken. She accepted notes were taken at the appeal but did not accept they were accurate. She did not deny the use of the word “snapped” to describe her conduct at the appeal hearing but did not positively recall the use of this word either-she was unsure.

32. Whilst it is unsatisfactory there are no signed notes for either meeting, the narratives reflect exactly the claimant’s case/version [now] of the incident save the disputed admissions. If she had not in fact made these, it would have had in my judgment to follow that Ms L Kirkby, Mr J Kirkby and the notetaker Ms B Davies had been complicit in falsifying the records of the internal hearings and giving untruthful evidence to the Tribunal which I find to be unlikely.

33. I therefore accept Ms L Kirkby’s evidence that the claimant had apologised before entering the room and that during the disciplinary meeting she had read the witness statements to the claimant who did not disagree with them/ admitted the misconduct. I do not believe the record is word perfect/fully complete. I accept Ms Kirkby’s evidence notes were taken but am not clear whether this was during or after the event. I do find the claimant was not orally advised of her right to appeal as stated by Ms Kirkby in her evidence. The notes do not record this as having been done either.

34. The appeal notes are reliable and broadly accurate. I was particularly struck by the evidence of Ms Davies that she had made a contemporaneous note of the appeal and her recollection of inserting the word “snapped” in inverted commas because it was direct speech used by the claimant when describing her actions. Ms Davies’s evidence was corroborated by Mr J Kirkby whom I considered to be an honest witness.

Ms Kantova’s evidence

35. The claimant gave evidence to the Tribunal explaining that she had had a stressful night and had had a phone call about her sister who had had seizures – three in a row – which left her unconscious and that she may not survive. She just wanted to give her morning handover and go home and grieve. She then saw resident wearing her coat. She approached him and asked him to give it to her. He refused and one of the carers offered to take it off him. She stepped away from him. Two carers tried to pull the sleeves off but he refused again. He folded his arms and

she saw her coat ripping under his arm. She approached him again and it took a few seconds to remove it over his head. She denied attacking or him and merely raised her voice saying give me my coat.

36. She felt that her the respondent had not considered the mental and emotional stress she had been under after the phone call about her sister's grave condition and that her hard work and clean record had not been taken into account. She felt the penalty was harsh for just this one incident.

Relevant Legal Framework

Unfair Dismissal

37. If a potentially fair reason within section 98 is shown, such as a reason relating to conduct, the general test of fairness in section 98(4) will apply. This reads as follows:

- “(4) Where the employer has fulfilled the requirements of sub-section (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.”

38. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

39. The “**Burchell test**” involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

40. If a genuine belief is established, the band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23**. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether the employer's actions and decisions fell within that band.

41. The circumstances relevant to assessing whether an employer acted reasonably in its investigations include the gravity of the allegations, and the potential effect on the employee: **A v B [2003] IRLR 405**.

42. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

43. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613**.

44. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee (instead of imposing a lesser sanction) was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

45. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer had reasonable grounds for treating the misconduct as gross misconduct: see paragraphs 29 and 30 of **Burdett v Aviva Employment Services Ltd UKEAT/0439/13**. Generally gross misconduct will require either deliberate wrongdoing or gross negligence. Even then the Tribunal must consider whether the employer acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

Submissions

46. In his written submission Mr Hayes, for the claimant alleged that the staff written statements summarised above had been orchestrated by the directors to justify their actions and that notes taken in the disciplinary process were either fabricated and/or not a true recollection of the meetings. He further submitted there was procedural unfairness as there was no separate investigatory meeting and the witness statements were not made available to the claimant in advance of the disciplinary hearing. Whilst these were provided for the appeal, he complains that it was at his instigation an appeal was heard and only following his correspondence. Moreover, the appeal was heard beyond the 5-day period recommended by ACAS.

47. He maintained that the gravity of the offence was overstated. This was borne out by the lack of police action and the fact, contrary to what he had been told, she did not have her right to work removed by the SOVA process. The claimant's actions were out of character, and she had acted in a way she had never done before due to very particular and difficult circumstances. Mr Hayes said the penalty was far too harsh and that the respondent did not deal with her compassionately given her work-related stress. He complained no policy on this topic had been given to him despite requests.

48. The respondent submitted it had been presented with compelling witness testimony that the claimant had ill-treated a vulnerable resident using unnecessary force to remove his coat. She had never disputed their accuracy indeed admitted the

misconduct at and prior to the disciplinary meeting and at appeal. It contended the procedure followed and outcome was fair paying all due regard to the circumstances and the claimants unblemished work record.

Discussion and Conclusions

49. I had explained to the parties at the outset that the focus must be upon the evidence before the respondent **at the time of the dismissal** and not on that presented subsequently. On this basis, having found the claimant had admitted the misconduct to the respondent her (different) evidence to the Tribunal narrating how she sees matters now, is irrelevant to my decision.

50. Likewise, the evidence of Ms Reilly and Ms Heywood given to the Tribunal is largely irrelevant. What counted was their evidence to given to the disciplinary hearing. It is however significant that Mr Hayes did not put to these witnesses the allegation in his written submission that the directors had orchestrated their evidence. I reject the submission which should not have been made. Having heard from these witnesses, it was clear to me they provided their own independent evidence to the respondent who was entitled to take it at face value.

51. The issues remain as identified at the outset of these proceedings and I can now determine them as follows:

Did the respondent genuinely believe the claimant was guilty of misconduct?

52. The respondent considered the allegation faced by the claimant, specifically of violence/ill treatment of the resident, to be misconduct which could result in disciplinary action

Was that belief based upon reasonable grounds?

53. In view of my findings above the respondent had the cumulative effect of six witnesses on which to base and sustain reasonable grounds to establish a belief that on the 1 March 2021 the claimant used excessive force against a vulnerable 74-year-old resident suffering from Alzheimer's disease. The claimant made admissions as to that misconduct during the disciplinary process.

Was that belief formed following a reasonable investigation?

54. The extent of an investigation/procedure and the form it takes will vary according to the circumstances. There is no absolute rule that the investigation should be held separately to the disciplinary hearing so long as it is as full as the circumstances reasonably require. I note the respondent is a small business without a dedicated HR function. Given the staff evidence and the claimants immediate acceptance of her wrongdoing, there was little or no factual issue to determine.

Did the respondent follow a reasonably fair procedure?

55. The claimant should have been given the witness statements and other relevant documentation before the first disciplinary meeting. Failure to do so, notwithstanding the claimants' admissions was less than ideal and this had a knock-on effect in giving the impression that that hearing was rushed. However, these documents were provided for the appeal, and allowing for the possibility canvassed

by Mr Hayes that the respondent needed to be chased to get things underway, it took place a short time later. I consider any procedural defects at the disciplinary meeting were cured by a fairly conducted appeal process.

56. The claimant had sufficient detail of the allegation and a fair chance to respond by being given the opportunity to put forward evidence in her defence and present mitigation. She was given the right to be accompanied/represented. Following dismissal, she was given a right to an appeal with the same opportunity to respond and be accompanied/represented.

57. The procedure was reasonably fair despite my findings of shortcomings.

Was dismissal rather than some lesser disciplinary penalty a reasonable sanction?

58. The question is what the reaction of a reasonable employer to this situation would be considering the circumstances, the claimants good service and conduct. The focus is on their viewpoint and not mine. There is a band or range of reasonable responses within which the employer can lawfully decide the question of penalty. If it is within those parameters then the dismissal is fair.

59. The resident was a 74-year-old man suffering from Alzheimer's. His vulnerability and that of other people in the respondent's care had to be the foremost consideration.

60. The safeguarding authority had to be informed together with other regulatory bodies. The police recorded the matter as a crime. The respondent had to consider whether they could trust the claimant to continue working in her role and/or whether it would be appropriate to take that risk in the light of their wider responsibilities and the need to be consistent with other staff who might find themselves committing this type of behaviour when life's stresses arise, as they do from time to time.

61. The decision to characterise this matter as gross misconduct justifying summary dismissal was one they were entitled to make and, on that basis, the claimant was fairly dismissed.

Employment Judge Ganner

Date: 27 April 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

12 May 2022

FOR THE TRIBUNAL OFFICE

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