EMPLOYMENT TRIBUNALS

Claimant: **Ms Omolara Makinde**

Respondent: **R G Care Ltd**

Heard at: **East London Hearing Centre**

On: **7 December 2022**

Before: **Employment Judge S Knight**

Representation

Claimant: Mr Fola Ajala (Graceland Solicitors)

Respondent: Ms Asch-D'Souza (Avensure)

JUDGMENT having been sent to the parties on 12 December 2022 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

Introduction

The parties

1. The Claimant was employed by the Respondent's predecessor from 13 November 2018, and was subject to TUPE transfers. She was employed until 22 March 2022, when she was summarily dismissed. She was employed as a care assistant. The Respondent is a business which operates 8 care homes for children, vulnerable adults, and older people.

The claims

2. The Claimant claims for unfair dismissal arising out of her dismissal without notice.

3. On 9 June 2022 ACAS was notified under the early conciliation procedure. On 14

June 2022 ACAS issued the early conciliation certificate. On 28 June 2022 the ET1 Claim Form was presented. On 1 August 2022 the ET3 Response Form was sent to the Tribunal.

The issues

4. At the start of the hearing the parties agreed a List of Issues with the Tribunal. It appears at Annex A to this judgment.

Procedure, documents, and evidence heard

Procedure

5. This has been a remote hearing conducted using the Cloud Video Platform.

6. At the start of the hearing I checked whether any reasonable adjustments were required. None were requested.

Documents

7. I was provided with an agreed 192-page Hearing Bundle along with witness statements from the Claimant and Tony Bloom, director of the Respondent.

Evidence

8. At the hearing I heard evidence under oath from the Claimant and Mr Bloom. Each of the witnesses adopted their witness statements and added to them appropriately in answer to questions.

Closing submissions

9. The representatives made oral closing submissions.

Findings of fact on liability

The Respondent's business

10. The Respondent operates multiple care homes, including the one that the Claimant worked at. That care home cares for young vulnerable adults. It is regulated by various bodies including the CQC and the London Borough of Havering.

11. The Respondent has policies which cover many areas of its activities, including the interaction of its staff with the people in its care, and a disciplinary policy.

12. At the time of the Claimant's dismissal the Respondent was overstaffed at the home. At the home it employed some longstanding staff, but there were also new staff. Some new staff were concerned about how they would retain their jobs if the Respondent removed staff who it did not need.

The Claimant's employment by the Respondent.

13. The Claimant came into the Respondent's employment through TUPE transfer.

She worked at the home for almost 4 years in total. In that time there had been many spot checks, including spot checks carried out by Mr Bloom. No evidence of any misconduct had been found against the Claimant in that time. Some of the spot checks were carried out at night. On those spot checks the Claimant was never found sleeping.

The allegations against the Claimant

14. On 18 February 2022 an anonymous member of the Respondent's staff emailed Mr Bloom and his colleague Lynn Bannister. The member of staff knew that they were very senior members of the organisation, and in particular that they were senior to another member of staff, Chloe Wakeham. The anonymous member of staff reported a series of concerns about the Claimant and 3 other members of staff. The whistleblower said that they slept on the job, that they did not carry out cleaning duties, and that they had used mops to hit service users. The whistleblower claimed to have videos of the abuse. The whistleblower claimed that it was against the law to have such videos, but that they were telling the Respondent about the abuse so that the Claimant and the 3 others did not bring a bad reputation to the Respondent.

15. Mr Bloom and Ms Bannister took the allegations extremely seriously. They spoke about how to proceed, and agreed a way forward. The next morning Ms Bannister wrote to the whistleblower by email, variously asking and directing the whistleblower on 3 occasions to share the video evidence with them. She also gave the whistleblower the option of taking annual leave during an investigation, or moving to an alternative workplace.

16. The Claimant and the other accused were suspended on full pay whilst an investigation took place.

The investigation

17. The investigation involved Ms Bannister and another member of the Respondent's staff, Mitchell Letherby, taking statements from members of staff, interviewing the accused, and attempting to interview some of the residents. On 22 February 2022 they also took a statement from the whistleblower. In that statement the whistleblower alleged that the Claimant does not clean and is always on her phone, and that she had chased a service user with a mop stick to his room. The whistleblower also claimed that they had had some video evidence but that Chloe Wakeham had told them to delete it because it was illegal to make the video recording, and the whistleblower would be in trouble, and the whistleblower now could not retrieve the video.

18. They further took a statement from a friend of the whistleblower who broadly supported the whistleblower's account.

19. The Respondent also obtained statements from members of staff making clear that the Claimant had not engaged in any inappropriate conduct.

20. On 2 March 2022 Ms Bannister and Mr Letherby held an investigation interview with the Claimant. The allegations were not put to the Claimant. Rather, questions

were put in a style that would be appropriate if the Claimant was a witness to others' conduct. The Claimant in the course of the meeting denied seeing any inappropriate conduct but did raise concerns about the management of the home.

21. On 7 March 2022 the Respondent wrote to the Claimant and the other accused inviting them to disciplinary hearings to be held on 22 March 2022. The only specific allegations against the Claimant were that she engaged in physical and mental abuse of service users and that she slept during night shifts.

22. The Respondent provided to the Claimant anonymised witness statements, the original whistleblowing email, and its disciplinary policy. It did not provide to her the recordings that the whistleblower claimed to have created, because it did not have them in its possession.

23. The Respondent held disciplinary hearings in respect of each of the accused back-to-back on the same day. They were required to attend individually. They were not enabled to give evidence in support of each other. 3 of them were dismissed at the conclusion of their own disciplinary hearings. 1 of them resigned at the start of the disciplinary hearing.

24. The disciplinary hearing for the Claimant took place at 13:00 on 22 March 2022. The meeting was between Tony Bloom and the Claimant. Emma Williams, an Assistant Area Manager of the Respondent, attended as a minute taker. Tony Bloom was the ultimate decision-maker in the meeting. The minutes of the meeting are plainly inaccurate and incomplete on their face, containing obvious errors. Mr Bloom reviewed the notes before they were finalised and sent to the Claimant, but did not make any corrections despite the obvious inaccuracies on their face. The Claimant made an audio recording of the disciplinary hearing. She told Mr Bloom that she was making the recording part way through the hearing.

25. The entirety of the disciplinary hearing was complete within 10 minutes.

26. Mr Bloom expected the Claimant to bring a statement with her to the meeting, along with witness statements from other members of staff to support her. However, she had not been told that the former was required, or that the latter was allowed. The Claimant had been suspended from work and it would have been misconduct for her to enter the Respondent's premises during the investigation to take statements from any other members of staff. Mr Bloom tried to suggest at the hearing of this claim that the Claimant was allowed to attend the Respondent's premises to take statements from members of staff. However, he could point to nowhere that the Claimant had been told this, and claimed that he assumed that someone else would have told her. He also suggested that this was permitted by the disciplinary policy, but later on being shown the policy agreed that it was not envisaged by the policy. I do not accept his evidence about this issue. The Claimant was not told that she was allowed to come in to take statements from members of staff, and Mr Bloom did not believe that she had been told this. It was clear to him that she had been completely banned from attending the Respondent's premises during the suspension.

27. At the start of the disciplinary hearing Mr Bloom began by asking the Claimant if she had any mitigation. This is because he had already made up his mind that

the allegations against her were proven. As he said in evidence at the hearing of this claim, he made the decision on the statements that had been taken and the Respondent's policies. As the minutes record he said in the meeting, on the basis of the statements he received he had decided that the Claimant had committed gross misconduct, and unless mitigation was given, the outcome would be termination. He stated outright before he had received an explanation that the people who had been suspended had "acted with gross neglect". He treated the Claimant talking back to him at the disciplinary meeting and trying to put her case as being evidence that she was aggressive, and therefore aggressive towards service users.

28. It did not matter what the Claimant said in the disciplinary meeting. She was always going to be dismissed by the end of it.

29. In the letter recording the Claimant's dismissal, the Respondent wrote that the Claimant was not able to produce any evidence that the allegations were unfounded. The letter confirmed that the Claimant was summarily dismissed for gross misconduct.

Events after the dismissal

30. The Claimant had a right of appeal to Adrienne Bloom. Adrienne Bloom is Tony Bloom's wife.

31. The Claimant did not appeal the decision to dismiss her. However, in response to receiving the record of the disciplinary hearing she immediately sent to Adrienne Bloom and Emma Williams an email saying that the record was wrong, and attaching a voice recording of the hearing. The Claimant thought that appealing was pointless, and that in any event that Respondent had irretrievably destroyed the working relationship between it and her by making the allegations against her and not giving her the ability to answer them.

32. The Respondent reported the matter to the local safeguarding authorities at the London Borough of Havering. The safeguarding authorities found that the allegations of abuse were proved on the balance of probabilities. However, the Claimant was given no opportunity to feed into that investigative process. The notes of the meetings with her were provided, but she was not given the opportunity of answering the substantive allegations against her. As such, the investigation by the London Borough of Havering is of limited use to this Tribunal.

33. The Respondent reported the matter to the police. They took no action in relation to the allegations.

34. The Respondent wrote to the Disclosure and Barring Service making allegations against the Claimant. The allegations now show up when the Claimant seeks work in the care sector. The effect of this has been that it is impossible for the Claimant to find work in the care sector.

Relevant law

35. Section 94 of the Employment Rights Act 1996 ("**ERA 1996**") provides that an

employee with sufficient qualifying service has the right not to be unfairly dismissed by their employer.

36. Section 98 of the ERA 1996 sets out potentially fair reasons for dismissal:

> "(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"

37. In the case of *British Home Stores v Burchell* [1980] I.C.R. 303 20 July 1978 the Employment Appeal Tribunal set down the test that the Tribunal applies in cases of unfair dismissal by reason of conduct. The burden of proof within the test was later altered by section 6 of the Employment Act 1980. As a result, the test applied by the Tribunal is as follows:

(1) The employer must show that it believed the employee guilty of misconduct.

(2) The Tribunal must determine whether the employer had in mind reasonable grounds upon which to sustain that belief.

(3) The Tribunal must determine whether, at the stage at which that belief was formed on those grounds, the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances.

(4) This means that the employer does not need to have conclusive direct proof of the employee's misconduct: the Respondent only needs to have a genuine and reasonable belief, reasonably tested. Further, there is no requirement to show that the employee was subjectively aware that their conduct would meet with the employer's disapproval.

38. In *Shrestha v Genesis Housing Association Ltd* [2015] EWCA Civ 94; [2015] IRLR 399; 18 February 2015 Lord Justice Richards noted at ¶ 23:

> "To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the Burchell test. The investigation should be looked at as a whole when assessing the question of reasonableness. As part of the process of investigation, the employer must of course consider any defences advanced by the employee, but whether and to what extent it is

necessary to carry out specific inquiry into them in order to meet the Burchell test will depend on the circumstances as a whole."

39. In considering the case generally, and in the Tribunal's assessment of whether dismissal was a fair sanction in particular, the Tribunal must not simply substitute its judgment for that of the employer in this case. Different reasonable employers acting reasonably may come to different conclusions about whether to dismiss. As Mr Justice Phillips noted when giving the judgment of the EAT in *Trust Houses Forte Leisure Ltd v Aguilar* [1976] IRLR 251; 1 January 1976:

> "It has to be recognised that when the management is confronted with a decision whether or not to dismiss an employee in particular circumstances, there may well be cases where more than one view is possible. There may well be cases where reasonable managements might take either of two decisions: to dismiss, or not to dismiss. It does not necessarily mean, if they decide to dismiss, that they have acted 'unfairly,' because there are plenty of situations in which more than one view is possible."

40. It is therefore not for the Tribunal to ask whether a lesser sanction would have been reasonable in this case, but whether or not dismissal was reasonable. The question is also not whether the Claimant committed gross misconduct but whether the Respondent had a reasonable belief she had.

Conclusions on liability

41. The parties agree that the Claimant was dismissed for alleged misconduct. This is a potentially fair reason for dismissal. There is no reason to depart from what the parties agree in this regard.

42. The Respondent says that Mr Bloom had a genuine belief that the Claimant had committed misconduct. The Claimant denies that he did have such a genuine belief, because the allegations against the Claimant were unfounded and there was an obvious absence of evidence. The Claimant's case in this regard is persuasive, because it cannot have escaped Mr Bloom's attention that the whistleblower had been less than truthful about the videos that they had claimed to have. The whistleblower claimed to have videos, and was repeatedly told by Ms Bannister to preserve them, but then claimed that a manager (who was subordinate to Ms Bannister) told them to delete the videos. There is no reason why a manager would do this, and I do not believe she did do this. Indeed, as I explain further shortly, I find that there was no video. However, I accept that Mr Bloom was so swept up in the seriousness of the allegation that he failed to turn a critical eye to the glaring inconsistencies in the evidence in front of him. He also failed to turn his attention to exculpatory evidence. As such, although the Claimant might be correct that there was an absence of evidence, and that this might tend to show that the Respondent therefore did not believe that there was misconduct, in this case I accept that Mr Bloom genuinely believed misconduct had taken place.

43. The Claimant says there were not reasonable grounds on which a belief that misconduct had taken place could be sustained. The Respondent says that there were such reasonable grounds. As I will go on to explain, this question is not

determinative of the claim. The Respondent does have a solid argument that two employees had made allegations against the Claimant, that those allegations could have been capable of belief, and that would amount to reasonable grounds.

44. Given its size and administrative resources, the Respondent's investigation left a lot to be desired. In particular, the limited way that witnesses were interviewed allowed detail to be missed. However, this on its own would not make the dismissal unfair. What is more important is the lack of ability afforded to the Claimant to defend herself.

45. The procedural fairness of the dismissal is the real crux of the case. The Claimant was afforded no ability to defend herself. Mr Bloom approached the disciplinary process with a closed mind. Having made his mind up before he began the disciplinary meeting, his mind was closed to the flimsy nature of the evidence, the inherent inconsistencies in the whistleblower's account, the exculpatory evidence from other witnesses, and the Claimant's account. He was disgusted by the Claimant's behaviour, and he told her this from the outset. Nothing was going to shake him from that decision, and every action of the Claimant's in the disciplinary meeting, from not providing exculpatory evidence from witnesses she could not take statements from, to putting her case in her defence, merely confirmed her guilt to him. From before the Claimant walked into the disciplinary meeting the decision had already been made, for her, and for each of the accused in their separate disciplinary meetings. This was manifestly procedurally unfair.

46. Dismissal as a sanction for the serious allegations of misconduct would have been a reasonable response. Indeed, most employers would conclude that an assault in a care setting must automatically and necessarily lead to dismissal, absent some special reason not to dismiss. However, the absence of procedural fairness made the dismissal unfair.

Findings of fact on remedy

47. The Respondent contends that the Claimant would have been fairly dismissed if a fair procedure had been used and that she contributed to her own dismissal. The Respondent also says that the Claimant failed to mitigate her loss. As such I have to make some further findings of fact.

48. If a fair procedure had been used the Respondent would have used a decision-maker who did not have a closed mind. The decision-maker would have afforded the Claimant the opportunity to defend herself. In the circumstances, it would then have had evidence and argument before it which made it more likely than not that the allegations against the Claimant were false.

49. Mr Bloom made clear that he would make up his mind whether an allegation was proved on the balance of probabilities. As such, if he had been a fair decision-maker, he would have found the allegations of misconduct against the Claimant not to have been proved. He therefore would not have dismissed the Claimant.

50. Further, I am required to find whether the Claimant did in fact abuse any patients or sleep on the job. Given that the Claimant was regularly subject to spot checks, and given that residents were checked daily during personal care for any bruises

they had, and none were ever attributed to the Claimant, it is evident that the Claimant had not previously slept on the job or abused residents. No resident made an allegation against the Claimant. The Claimant would have nothing to gain from the abuse alleged against her, and everything to lose.

51. Further, I cannot accept that a video in the possession of the whistleblower existed and was deleted. I do not believe that, if a senior manager told the whistleblower to share the video, they would have deleted it, even if another, more junior, manager told them it was illegal to record it. In any event, the more junior manager plainly did not say it was illegal to record it. This fatally undermines the credibility of the whistleblower. I prefer the evidence of the Claimant that the Respondent was overstaffed and so the whistleblower and the whistleblower's friend concocted the allegations against the Claimant and 3 others to reduce the number of staff and increase their chance of being retained in employment.

52. The Respondent also suggests that there were exculpatory witness statements because its staff stuck together to protect the Claimant. That is ludicrous. If it believed this, then it would have disciplined its other staff for covering up abuse.

53. I therefore find that the Claimant did not cause or contribute to her dismissal.

54. The Claimant's continued employment in the care sector was made nearly impossible by the Respondent's actions surrounding the Claimant's dismissal, in particular the DBS report.

55. The Claimant has taken reasonable steps to find new employment. She has worked but that employment will not continue.

Conclusions on remedy

56. The Basic Award is 3 weeks' pay at £259.77 per week = £779.31.

57. The Compensatory Award is composed of a Prescribed Element and a Non-Prescribed Element.

58. The Prescribed Element is made up of the Claimant's lost wages and pension contributions, minus some minimal wages she has managed to earn since her dismissal. The net lost wages are 37.1429 weeks' wages at £106.86 net per week = £3,969.09. The lost pension contributions are 37.1429 weeks' pension contributions at £7.11 per week = £264.09. The Prescribed Element is therefore £4,233.18.

59. The Non-Prescribed Element is made up of other losses. The Claimant will take 26 weeks to find new employment. Her net weekly lost wages will be £236.87, for 26 weeks, = £6,158.62. Set off against this is £555 that she has already earned but not yet been paid, giving actual weekly lost wages of £5,603.62. The lost pension contributions are 26 weeks' pension contributions at £7.11 per week = £184.86. Loss of statutory protection and right to long notice are compensated at £500. That gives a total Non-Prescribed Element of £6,288.48.

60. Therefore, the total Compensatory Award is £10.521.66.

61. The Claimant's complaint of unfair dismissal is well-founded.

62. The Respondent is ordered to pay the Claimant a total of £11,300.97.

Employment Judge Knight
Dated: 19 March 2023

ANNEX 1: LIST OF ISSUES

Liability for unfair dismissal

1. What was the reason or principal reason for dismissal?
   The Respondent says misconduct.
   The Claimant says misconduct.

2. Was it a potentially fair reason?
   If it was misconduct, yes.
   If it was not misconduct, no.

3. If the reason was misconduct, did the Respondent genuinely believe the Claimant had committed misconduct?
   The Respondent says yes.
   The Claimant says no because the allegations were unfounded and there was an absence of evidence.

4. If the reason for dismissal was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? In particular:

   (1) Were there reasonable grounds for the belief in misconduct?

   (2) At the time the belief was formed had the Respondent carried out a reasonable investigation?

   (3) Had the Respondent otherwise acted in a procedurally fair manner?

   (4) Was dismissal within the range of reasonable responses?

Remedy for unfair dismissal

Basic award

5. To what basic award is the Claimant entitled?

6. Would it be just and equitable to reduce the basic award because of any conduct

of the Claimant before the dismissal? If so, to what extent?

Compensatory award

7. What financial losses has the dismissal caused the Claimant?

8. Has the Claimant taken reasonable steps to replace her lost earnings, for example by looking for another job?

9. If not, for what period of loss should the Claimant be compensated?

10. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

11. If so, should the Claimant's compensation be reduced? By how much?

12. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

13. Did the Respondent or the Claimant unreasonably fail to comply with the ACAS Code?

14. If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

15. Did she cause or contribute to dismissal by blameworthy conduct?

16. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

17. Does the statutory cap apply?